

23

SHDKT

PROCEEDINGS AND ORDERS

DATE: [03/15/95]

CASE NBR: [94100023] CFX

STATUS: [GRANTED]

SHORT TITLE: [Edmonds, WA]

]

VERSUS

[Oxford House, Inc., et al.]

DATE DOCKETED: [061394]

PAGE: [01]

DATE	NOTE	PROCEEDINGS & ORDERS
1 Jun 13 1994	G	Petition for writ of certiorari filed.
5 Jul 25 1994		Brief amicus curiae of Township of Upper St. Clair filed.
3 Jul 26 1994		Order extending time to file response to petition until August 31, 1994.
4 Jul 26 1994		This extension is granted for all respondents.
6 Jul 29 1994		Brief of respondents Oxford House, Inc., et al. in opposition filed.
7 Aug 30 1994		Order further extending time to file response to petition until September 30, 1994.
8 Aug 31 1994	G	Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae filed.
9 Sep 30 1994		Brief of respondent United States in opposition filed.
10 Oct 5 1994		DISTRIBUTED. October 28, 1994 (Page 1)
11 Oct 11 1994	X	Reply brief of petitioner filed.
12 Oct 31 1994		Motion of Pacific Legal Foundation for leave to file a

PREVIOUS

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1

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PAGE: [02]

DATE	NOTE	PROCEEDINGS & ORDERS
12 Oct 31 1994		Motion of Pacific Legal Foundation for leave to file a brief as amicus curiae GRANTED.
13 Oct 31 1994		Petition GRANTED. *****
14 Dec 7 1994		Brief amicus curiae of City of Fultondale, Alabama filed.
15 Dec 14 1994		Brief amicus curiae of Upper St. Clair filed.
16 Dec 14 1994		Brief amicus curiae of Lubbock, Texas filed.
17 Dec 15 1994		Brief amicus curiae of City of Mountlake Terrace, Washington filed.
18 Dec 15 1994		Brief amici curiae of International City/County Management Association, et al. filed.
19 Dec 15 1994		Joint appendix filed.
20 Dec 15 1994		Brief of petitioner City of Edmonds filed.
22 Dec 15 1994		Brief amicus curiae of Pacific Legal Foundation filed.
21 Dec 21 1994		SET FOR ARGUMENT WEDNESDAY, MARCH 1, 1995. (2ND CASE).

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PAGE: [03]

-----DATE-----NOTE-----PROCEEDINGS & ORDERS-----

23 Dec 23 1994 CIRCULATED.

24 Dec 30 1994 G Motion of the Solicitor General for divided argument filed.

26 Dec 30 1994 Order extending time to file brief of respondent on the merits until January 23, 1995.

27 Jan 5 1995 Record filed.

* Partial record proceedings United States Court of Appeals for the Ninth Circuit.

28 Jan 5 1995 Record filed.

* Original record proceedings United States District Court for the Western District of Washington. (BOX)

29 Jan 17 1995 Motion of the Solicitor General for divided argument GRANTED. to be divided as follows: 15 minutes - the Solicitor General; 15 minutes - private respondents.

30 Jan 17 1995 X Brief amici curiae of Massachusetts, et al. filed.

PREVIOUS

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Last page of docket

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-----DATE-----NOTE-----PROCEEDINGS & ORDERS-----

31 Jan 23 1995 X Brief amici curiae of American Society of Addition Medicine, et al. filed.

32 Jan 23 1995 X Brief amici curiae of American Train Dispatchers, et al. filed.

33 Jan 23 1995 X Brief amicus curiae of American Association of Retired Persons filed.

34 Jan 23 1995 X Brief amici curiae of American Association on Mental Retardation, et al. filed.

35 Jan 23 1995 X Brief amicus curiae of National Fair Housing Alliance filed.

36 Jan 23 1995 X Brief of United States filed.

37 Jan 23 1995 X Brief of respondents Oxford House, Inc., Oxford House Edmonds and Herb Hamilton filed.

38 Jan 23 1995 X Brief amicus curiae of American Planning Association filed.

39 Feb 22 1995 X Reply brief of petitioner filed.

40 Mar 1 1995 ARGUED.

①
94 - 23 JUN 13 1994

OFFICE OF THE CLERK

CASE NO: _____

THE SUPREME COURT OF THE UNITED STATES

TERM: OCTOBER 1993

CITY OF EDMONDS

Petitioner

v.

Washington State Building Code
Council, et al.,

Respondents

and

United States of America

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Counsel of Record

W. Scott Snyder

OGDEN MURPHY WALLACE

2100 Westlake Center Tower

1601 5th Avenue

Seattle, WA 98101

(206) 447-7000

18 pp

I. QUESTION PRESENTED FOR REVIEW

Does the traditional zoning definition of a "single family", established to limit the use and occupancy of residences in single family residential zones, constitute a "reasonable occupancy limitation" pursuant to the exemption created by the Fair Housing Act Amendments, 42 U.S.C. §3607(b)(1), when neutral on its face and applied without any evidence of an intent to discriminate against persons protected by the Fair Housing Act and Fair Housing Act Amendments, 42 U.S.C §§3601 - 3631?

II. PARTIES TO THE PROCEEDING

City of Edmonds, Washington

United States of America

Oxford House-Edmonds

Oxford House, Inc.

Herb Hamilton

Parties Dismissed¹

¹The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

III. TABLES

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(1974) 10, 18, 21

Village of Euclid, Ohio v.
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42 U.S.C. §3607(b)(1) ii, 2, 16

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Chapter 35A.63 RCW 9

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Rohan, Patrick J., Zoning
and Land Use Controls, 1968,
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IV. OPINIONS DELIVERED IN THIS CASE

1. Judge William L. Dwyer of the United States District Court, the Western District of Washington, entered an Order on Cross Motions for Summary Judgment in favor of the City of Edmonds and against the named defendants in the original action and the United States of America as plaintiff in the consolidated action on July 15, 1992. (See Order on Cross Motions for Summary Judgment dated July 14, 1992 and Judgment dated July 15, 1992, attached as Appendix A.)

2. The decision of the district court was reversed by Circuit Court Judges Eugene A. Wright, William C. Canby, Jr. and Thomas G. Nelson of the United States Court of Appeals for the Ninth Circuit on March 14, 1994. City of Edmonds v. Washington State Building Code Council, et

al., 18 F.3d 802 (9th Cir. 1994). (See opinion filed March 14, 1994, attached as Appendix B.)

V. GROUNDS FOR JURISDICTION

1. Judgment was entered by the Ninth Circuit on March 14, 1994.

2. No request for rehearing, reconsideration or review en banc was submitted in this matter.

3. Review is sought pursuant to Supreme Court Rule 10.1(a) and 28 U.S.C. 1254.

**VI. STATUTE AND ORDINANCE SECTIONS
RELIED ON**

42 U.S.C. §3607(b)(1) creates an exemption from the Fair Housing Act and Fair Housing Act Amendments:

Section 3607. Exemption.

. . .

(b) Numbers of occupants . . .

(1) [n]othing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

At issue is whether the following provisions of the City of Edmonds, Washington Community Development Code (hereinafter "ECDC") constitute such a reasonable occupancy limitation. ECDC Section 16.20.010 USES defines those uses permitted in a single family residential zone:

16.20.010 USES

A. Permitted Primary Uses.

1. Single-family dwelling units.

B. Permitted Secondary Uses.

1. Foster homes.

2. Home occupation, subject to the requirements of Chapter 20.20.
3. The renting of rooms without separate kitchens to one or more persons.
4. The keeping of three or fewer domestic animals.
5. The keeping of horses, subject to the requirements of Chapter 5.05.
6. The following accessory buildings:
 - a. Fallout shelters.
 - b. Private greenhouses covering no more than five percent of the site.
 - c. Private stables.
 - d. Private parking for no more than five cars.

ECDC Section 16.30.010 USES describes those uses permitted in multifamily residential zones. Because the Zoning Code of the City of Edmonds is cumulative in format, these uses are permitted in all

other (that is more intense) zones of the City. The section provides:

16.30.010 USES

A. Permitted Primary Uses.

1. Multiple dwellings.
2. Single-family dwellings.
3. Retirement homes.
4. Group homes for the disabled.
5. Boarding houses and rooming houses.
6. Housing for low income elderly in accordance with the requirements of Chapter 20.25.
7. Bus stop shelters.

B. Permitted Secondary Uses.

1. All permitted secondary uses in the RS zone, if in conjunction with a single-family dwelling.
2. Home occupations, subject to the requirements of Chapter 20.20.
3. The keeping of one domestic animal.

4. The following accessory uses:

- a. Private parking.
- b. Private swimming pools and other private recreational facilities.
- c. Private greenhouses covering no more than five percent of the site in total.

C. Primary Uses Requiring a Conditional Use Permit.

- 1. Offices.
- 2. Community facilities, including buildings used for community activities and services, such as:
 - a. Schools, colleges, universities.
 - b. Preschools, day care centers.
 - c. Hospitals, convalescent homes, rest homes, sanitariums.
 - d. Churches, temples, synagogues.

- e. Fire houses, police stations.
- f. Electric substations, pumping stations, water storage, drainage facilities, transmitting and receiving antennas.
- g. Parks, playgrounds, pools, golf courses, tennis clubs, lodges.
- h. Museums, libraries, art galleries, zoos, aquariums, planetariums.
- i. Counseling centers and residential treatment facilities for current alcoholics and drug abusers.

D. Secondary Uses Requiring a Conditional Use Permit.

- 1. Family day care homes.
- 2. Mini-day care facilities, provided that:
 - a. Mini day care facilities shall not be operated from or within a multiple family dwelling unit or combination of units, but

- b. A permit may be issued for a mini day care facility to be operated in a separate, non-residential portion of a multi-family residential dwelling structure operated primarily for the benefit of the residents thereof.

ECDC Section 21.30.010 FAMILY defines "family" for the purposes of the "use" provisions of the code:

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

VII. STATEMENT OF THE CASE

The City of Edmonds, Washington (hereinafter "City") has enacted a

comprehensive plan and zoning code (hereinafter "Community Development Code") pursuant to the authority granted it under the laws of the State of Washington. Washington Revised Code Chapter 35A.63 RCW. The Community Development Code sets aside a portion of the City exclusively for single family residential use. The structure of the City's code is common to the vast majority of cities in the State of Washington and many communities throughout the country. City of Edmonds v. Washington State Building Code Council, et al., 18 F.3d 802 (9th Cir. 1994).

The City's code provisions are consistent with the guidelines the Supreme Court has established. The United States Supreme Court first approved zoning codes setting aside reserves for single family use in Village of Euclid, Ohio v. Amber

Realty Co., 272 U.S. 365, 71 L.Ed. 303, 475 S.Ct. 114 (1926). The City's definition of a family, in a more expansive form, is based on the structure approved by the Court in Village of Belle Terre v. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974). Following the direction of the Court, the Community Development Code does not attempt to regulate either the numbers or degree of consanguinity of an extended "family." Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). Finally, the Community Development Code does not apply one set of use and occupancy limitations to groups of handicapped individuals and another to families and other groups of unrelated persons in violation of the precepts set forth in City of Cleburne, Texas v.

Cleburne Living Center Inc., 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 (1985).

The present dispute began during the summer of 1990. Mark Spence, a representative of Oxford House, Inc., the national parent organization of Oxford House-Edmonds, came to the Puget Sound area on behalf of his organization to establish a self-governing group residence for recovering alcoholics and drug addicts. (The factual statements in this petition are from the Clerk's papers filed with the Ninth Circuit which include a factual stipulation between the parties). Mr. Spence reviewed the houses available for rent in the July 6, 1990 edition of the Seattle Times classified advertisements. He selected a rental in Edmonds, Washington and leased the residence at 8704 - 216th Street S.W.,

Edmonds, Washington from defendant Herb Hamilton. Mr. Spence did not review the zoning classification of the residence prior to leasing it. It was the only residence about which he inquired.

Prior to occupation of the recovery house, Mr. Spence distributed literature describing Oxford House's operation to its neighbors. The literature described Oxford House's program including the need (in Oxford House's experience) for approximately 10 to 12 residents in order to provide an adequate economic base to enable the recovery house to be self-sufficient. After receiving the Oxford House literature, neighbors filed complaints with the City's zoning officials.

The City's code enforcement officer investigated the complaints by inspecting

the house with the permission and in the presence of an Oxford House representative. Based upon his inspection, the code enforcement officer found that more than five unrelated adult individuals were living in the house. The enforcement officer referred the matter to the city attorney's office for prosecution as a code violation. The City filed misdemeanor charges in municipal court against Mr. Spence, the Oxford House representative and Herb Hamilton, the owner of the house. These individuals in turn filed complaints with the U.S. Department of Housing and Urban Development (hereinafter "HUD") alleging violation of the Fair Housing Act Amendments.

Following contact by Tim Robison, a HUD investigator, City officials

voluntarily withdrew the pending charges and have taken no further enforcement action until this issue is resolved by the federal courts.

The City then initiated a declaratory judgment action against the Oxford House defendants, HUD and the State Building Code Council. The City also initiated review of its Community Development Code in order to assess its accommodation of the local Oxford House facility (hereinafter "Oxford House-Edmonds") and other congregate living arrangements of disabled persons. The City repealed sections which required a conditional use permit for group homes for the disabled in multi-family zones because of its concern that a conditional use permit requirement conflicted with the principles established in the City of Cleburne, Texas v. Cleburne

Living Center, 473 U.S. 432, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985). The City's amendments opened one-quarter of the City's rental housing stock or 186 single family residences for group home use as a matter of right.

At the district court the United States government requested dismissal of the United States governmental defendants. The district court granted the motion. Six months later, the Department of Justice initiated a separate civil action against the City alleging violations of the Fair Housing Act and Fair Housing Act Amendments. The two actions have been consolidated. In order to present a more straightforward issue to the district court, the parties entered into voluntary dismissals of the City of Everett, Washington, the Washington State Building

Code Council and Oxford House-Hoyt (an Oxford House facility in the City of Everett, Washington).

Cross summary judgment motions were presented to the Honorable William L. Dwyer, Judge of the U. S. District Court, Western District of Washington. Judge Dwyer entered a decision in favor of the City of Edmonds finding the City's definition of single family zoning to be within the exemption set forth at 42 U.S.C. §3607(b)(1) for the reasonable occupancy limitations of local governmental entities. His decision was based upon the plain meaning of the exemption and the Eleventh Circuit Court of Appeals decision in Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992), cert. denied, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct.

19, 1992). City of Edmonds v. Washington State Building Code Council, et al., Western District Court of Washington Case Nos.: C91-WD, C91-1273WD, (July 15, 1992).

The Ninth Circuit Court of Appeals reversed this decision explicitly rejecting the Eleventh Circuit's findings in Elliott. The Court of Appeals found the exemption to be ambiguous as applied to the Edmonds ordinances and based its decision in large part upon the legislative record before Congress.

VIII. GROUNDS FOR ORIGINAL JURISDICTION

Original jurisdiction in this matter was based upon federal question jurisdiction: the jurisdiction of the Court of Appeals was based on an appeal from the final judgment of a United States District Court. 28 U.S.C. 1331 and 28 U.S.C. 1294(1).

**IX. ARGUMENT - REASONS RELIED ON FOR
ALLOWANCE OF THE WRIT**

The United States Supreme Court has recognized the fundamental purposes of zoning codes and established guidelines for the exercise of zoning authority by local entities.

The basic building block for the exercise of zoning powers by a local jurisdictions is the creation of a zone in each community set aside for the residential use of single families.

Village of Euclid, Ohio v. Amber Realty Co., 272 U.S. 365, 71 L.Ed. 303, 475 S.Ct. 114 (1926). Over the years the Supreme Court has affirmed a community's ability to limit the number of unrelated adults who may occupy a residence in the single family zone and struck down attempts to regulate by similar definitions extended familial relationships. Village of Belle

Terre v. Boraas, 416 U.S. 1, 39 L.Ed.2d 797, 94 S.Ct. 1536 (1974); Moore v. City of East Cleveland, Ohio, 431 U.S. 494, 52 L.Ed.2d 531, 97 S.Ct. 1932 (1977). Over the past 68 years the United States Supreme Court defined by a series of "bright line" decisions the area in which communities may exercise their zoning powers.

At issue in this case is the impact, if any, of the Fair Housing Act Amendments upon traditional Euclidian zoning schemes. Respondents assert that Congress intended, by its passage of the Fair Housing Act Amendments, to prohibit cities from regulating the number of unrelated disabled persons who may occupy a residence in a single family zone. They reason that because traditional single family zoning does not (and indeed cannot)

regulate the number of "family members" who can occupy a residence, but limits the number of unrelated disabled persons who may do so, traditional single family zoning allegedly discriminates against the disabled in violation of the Fair Housing Act.

Local governments utilize single family zoning as the basic building block for their zoning schemes. Except in a limited number of states whose constitutions limit or prohibit regulation of unrelated adults, most communities differentiate families and groups of unrelated adults as they define single family zoning. Rohan, Patrick J., Zoning and Land Use Controls, (1968), pp. 3-162 fn8; Anderson, Robert M., American Law of Zoning, (1986), p. 198. City of Edmonds v. Washington State Building Code Council,

18 F.3d 802 (9th Cir. 1994). In doing so, local jurisdictions have relied upon the direction provided by the United States Supreme Court in Euclid, Belle Terre and Moore. That reliance by many local jurisdictions throughout the country makes the issue presented by this case of national importance.

Furthermore, the Federal Courts of Appeal are in conflict on this issue. The Eleventh Circuit in its decision in Elliott v. City of Athens, Ga., 960 F.2d 975 (11th Cir. 1992), cert. denied, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct. 19, 1992) found traditional single family zoning to be a type of occupancy limitation exempt from Fair Housing Act coverage. The Third Circuit applied similar reasoning in a decision upholding a zoning ordinance

limiting the residency of unrelated adults when applied to a shelter for battered women. Doe v. City of Butler, 892 F.2d 315, 320 (3rd Cir. 1989). The Eighth Circuit has affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes despite a restriction of the housing choices of the disabled. Familystyle of St. Paul, Inc. v. City of St. Paul, Minn., 728 F. Supp. 1396 (D. Minn. 1990) aff'd 923 F.2d 91 (8th Cir. 1991). The Ninth Circuit's decision in this case expressly rejects the reasoning of the Eleventh Circuit and conflicts with the position of the Eleventh, Third and Eighth federal circuits.

Over the years, the federal courts have studiously avoided becoming zoning bodies of first resort. The Ninth Circuit

decision in this case would remove the basic zoning block of single family residential zoning and place the federal courts in the position of reviewing the choices of groups of unrelated disabled persons without regard to the carefully developed, neutral zoning schemes of local jurisdictions. Nothing in the legislative history indicates Congress' intent to overturn single family zoning. Rather it indicates an intent only to codify the holding in City of Cleburne, Texas v. Cleburne Living Center Inc., 473 U.S. 432, 87 L.Ed.2d 313, 105 S.Ct. 3249 (1985). The Cleburne decision prohibited disparate treatment of groups of disabled persons from other groups of unrelated persons. The Ninth Circuit's decision would prohibit disparate treatment groups of unrelated disabled persons from related

groups, families, and is an unwarranted expansion of the Fair Housing Act Amendments which attacks the basic building block of zoning.

In this case a facially neutral ordinance with no evidence of discriminatory application or intent is alleged to be discriminatory based solely upon its distinction between families and unrelated adults, a distinction based on the line of Supreme Court decisions regarding single family zoning. The split in the Circuits creates an atmosphere of uncertainty that necessitates resolution. Until this issue is resolved profit and nonprofit investors in residential treatment facilities and local governments are without clear direction.

The City of Edmonds therefore respectfully requests that the Court

accept review of this matter and address the split between the federal circuits and the uncertainty created for local jurisdictions and the disabled community, particularly nonprofit organizations sponsoring recovery homes. The City of Edmonds initiated a declaratory judgment in order to obtain the direction of the federal courts on the application of the Fair Housing Act and Fair Housing Act Amendments, 42 U.S.C. §§3601 - 3631, to its Community Development Code. The City has made no attempt to oppose the establishment of recovery houses and throughout this litigation has expressly recognized the need throughout our country for residential treatment alternatives for recovering drug addicts and alcoholics. The city has taken reasonable steps to ensure that such facilities may be

operated within its borders. From the City's perspective the issue is not whether such organizations are to be allowed within a community but where and at whose direction. Accordingly the City urges the Court to accept review of this issue.

Respectfully submitted this 9 day of June, 1994.

OGDEN MURPHY WALLACE

By:


W. Scott Snyder

APPENDIX A

FOR PUBLICATION

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

CITY OF EDMONDS, a
municipal corporation,

v.

Plaintiff-Appellee,

WASHINGTON STATE
BUILDING CODE COUNCIL,

Defendant,

and

OXFORD HOUSE, INC., a
Delaware corporation;
OXFORD HOUSE-EDMONDS,
an unincorporated
association and HERB
HAMILTON,

Defendants-Appellants.

No. 92-36640

D.C. No.

CV-91-215-WLD

UNITED STATES OF
AMERICA,

Plaintiff-Appellant,

v.

CITY OF EDMONDS, a
municipal corporation,

Defendant-Appellee.

No. 92-36735

D.C. No.

CV-91-1273-WLD

OPINION

Appeal from the United States District
Court for the Western District
of Washington

William L. Dwyer, District Judge,
Presiding

Argued and Submitted
January 5, 1994—Seattle, Washington

Filed March 14, 1994

2539

2540 EDMONDS V. WASHINGTON STATE BLDG. CODE COUNCIL

Before: Eugene A. Wright, William C.
Canby, Jr., and Thomas G.
Nelson, Circuit Judges.

Opinion of Judge Wright

SUMMARY

**Individual Rights / Housing
Discrimination/Real Estate**

The court of appeals reversed a district court judgment and remanded. The court held that a city's zoning provision limiting certain neighborhoods to detached buildings used by two or more related persons or a group of five or fewer unrelated persons was not exempt from housing discrimination requirements under the Fair Housing Amendments Act of 1988 (FHAA).

Under appellee City of Edmonds' Community Development Code, single-family dwelling units are the only permitted

EDMONDS V. WASHINGTON STATE BLDG. CODE COUNCIL 2541

primary uses in neighborhoods zoned single-family residential. Single-family dwelling unit is defined to mean a detached building used by an individual, two or more related persons, or a group of five or fewer unrelated persons.

Appellant Oxford House-Edmonds, a leased residence for 10 to 12 recovering adult alcoholics and drug addicts, stands in a neighborhood zoned single-family residential. Oxford House violated the City's zoning provision because it housed more than five unrelated persons. The City issued criminal citations and declined to permit continued operation of Oxford House in the residential zone.

The FHAA prohibits discrimination against the handicapped in the sale or rental of a dwelling. Reasonable local restrictions "regarding the maximum number

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of occupants permitted to occupy a dwelling," however, are exempt from the FHAA.

The City filed a declaratory judgment action, seeking a ruling that the single-family residential zoning provision did not violate the FHAA. The government filed an action alleging that the City's failure to make a reasonable accommodation violated the FHAA. The actions were consolidated, and the district court granted summary judgment to the City. The court ruled that the challenged zoning provision was exempted from the FHAA's requirements because it was a restriction "regarding the maximum number of occupants permitted to occupy a dwelling."

Oxford House and the government appealed, contending that the FHAA exempts only those restrictions that limit the

number of all occupants, whether related or not.

[1] The FHAA's plain language did not reveal whether Congress intended to exempt the City's zoning ordinance. The zoning provision did not regulate the maximum number of related occupants.

[2] Exempting the City's zoning provision, however, would contravene a House Report's directive that exempted restrictions apply to all occupants. [3] Moreover, exempting the City's ordinance as an occupancy restriction would undermine the purposes of the FHAA. [4] The legislative history and purposes of the FHAA demonstrated that Congress intended city zoning policies to reasonably accommodate handicapped persons.

COUNSEL

Irving Gornstein, United States Department of Justice, Washington, D.C., for the plaintiff-appellant.

Robert L. Heller, Douglas H. Fleming, Riddell, Williams, Bullitt & Walkinshaw, Seattle, Washington, for the defendants-appellants.

W. Scott Snyder, Ogden, Murphy & Wallace, Seattle, Washington, for the plaintiff-appellee-defendant-appellee.

OPINION

WRIGHT, Circuit Judge:

Group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in

EDMONDS V. WASHINGTON STATE BLDG. CODE COUNCIL 2545

Edmonds, Washington. We ask whether the Fair Housing Amendments Act of 1988 (FHAA) exempts Edmonds' zoning ordinance from the statute's prohibition against discrimination based on handicap. The district court held that an exemption in the FHAA for occupancy restrictions applied. It relied on a similar holding in *Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992). We disagree with *Elliott*, and so must reverse and remand.

BACKGROUND

Oxford House-Edmonds (Oxford House) is a leased residence for 10 - 12 recovering adult alcoholics and drug addicts.¹ The residents are handicapped

¹Much of the background is drawn from a joint stipulation submitted by the parties with their cross-motions for summary judgment.

persons under the FHAA, 42 U.S.C. § 3602(h). The home stands in a residential neighborhood away from commercial zones, liquor stores, and illicit drug activity to minimize the likelihood of a relapse by a resident.

It is an unincorporated association that operates under a charter issued by Oxford House, Inc., which sponsors houses around the country, including 17 in Washington State. It is self-supporting, democratically governed, and required to expel any resident who uses alcohol or drugs. The house must have 6 or more residents to ensure financial self-sufficiency, to provide a supportive atmosphere for successful recovery, and to comply with federal requirements for the receipt of state start-up loans. 42 U.S.C. § 300x-25.

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Oxford House is in a neighborhood zoned single-family residential. Edmonds Community Development Code (ECDC) § 16.20.000 et seq. The only permitted primary uses are single-family dwelling units. ECDC § 16.20.010(A)(1). "[A] single family dwelling [unit] means a detached building used by one family, limited to one per lot." ECDC § 21.90.080. "Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage. . . ." ECDC § 21.30.010.

Edmonds issued criminal citations to the owner of the Oxford House and one resident. Oxford House violated the zoning provision because it housed more than five unrelated persons. Edmonds

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agreed "to refrain from any enforcement action until the resolution of this litigation." Oxford House requested that Edmonds make a reasonable accommodation as required under the FHAA, 42 U.S.C. § 3604(f)(3)(B), by permitting it to continue operation in the single-family residential zone. The city declined to permit continued operation in the residential zone, but did pass an ordinance listing group homes as permitted uses in multi-family and general commercial zones. There are no allegations that Edmonds acted out of any animus against the occupants of Oxford House because of their handicap.

Edmonds filed a declaratory judgment action. It sought a ruling that the single-family residential zoning provision did not violate the FHAA. The United

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States filed an action alleging that Edmonds' failure to make a reasonable accommodation violated the FHAA. The two were consolidated. The district court granted summary judgment to Edmonds. It ruled that the challenged zoning provision was exempted from the requirements of the FHAA because it was a "restriction[]" regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Oxford House and the United States appeal.²

ANALYSIS

We examine whether 42 U.S.C. § 3607(b)(1) exempts Edmonds' single-family zoning ordinance. Whether Edmonds complied with the substantive requirements of the FHAA is not at issue because the

²These parties are referred to as Oxford House.

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district court did not reach that question. The district court had jurisdiction under 28 U.S.C. § 1331, and we have jurisdiction under 28 U.S.C. § 1291. We review de novo the grant of summary judgment. *Jones v. Union Pac. R.R.*, 968 F.2d 937, 940 (9th Cir. 1992).

Courts generously construe the Fair Housing Act (FHA), 42 U.S.C. § 3601, et seq. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). As a broad remedial statute, its exemptions must be read narrowly. *Elliott*, 960 F.2d at 978-79 (construing FHAA); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) (construing Fair Labor Standards Act).

We look to the text of the statute to evince Congressional intent. The plain language will control, "unless (1) the statutory language is unclear, (2) the

plain meaning of the words is at variance with the policy of the statute as a whole, or (3) a clearly expressed legislative intent exists contrary to the language of the statute." *Columbia Pictures Indus., Inc. v. Professional Real Estate Investors, Inc.*, 866 F.2d 278, 280 n.4 (9th Cir. 1989).

A. Plain Language of FHAA

Congress passed the Fair Housing Act as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81. It initially prohibited discrimination on the basis of race, color religion, or national origin. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub. L. 100-430, 102 Stat. 1619.

The FHAA makes it unlawful

[t]o discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap.

42 U.S.C. § 3604(f)(2). It defines discrimination to include

a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

42 U.S.C. § 3604(f)(3)(B). Participation in a supervised drug rehabilitation

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program, coupled with non-use, meets the definition of handicapped. 42 U.S.C. § 3602(h); *United States v. Southern Management Corp.*, 955 F.2d 914, 922 (4th Cir. 1992).

The FHAA exempts certain regulations:

Nothing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. § 3607(b)(1). Edmonds' use restriction permits "two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related" to live in a single-family dwelling. ECDC § 21.30.010. The question is whether section 3607(b)(1)

exempts Edmonds' single-family residential zoning ordinance from the FHAA.

[1] We cannot discern from the plain language of the statute whether Congress intended to exempt Edmonds' zoning ordinance. Edmonds argues that its single-family use restriction is a "restriction regarding the maximum number of occupants." 42 U.S.C. § 3607(b)(1). Yet the zoning provision does not regulate the maximum number of related occupants. Oxford House argues that the statute exempts only those restrictions that limit the number of all occupants, whether related or not. Although both interpretations could be inferred, neither follows directly from the plain language.³

³Put differently, Edmonds reads the exemption broadly to include use restrictions, and Oxford House reads the exemption narrowly to cover only occupancy

B. Legislative History of Exemption

When a statute is ambiguous, legislative history may provide guidance. *Toibb v. Radloff*, 111 S. Ct. 2197, 2200

restrictions. The two differ. Occupancy restrictions are typically found in housing codes.

Housing codes . . . set minimum standards for the occupancy of residential units. Items covered in such codes may include minimum space per occupant The major purpose of housing codes is to prevent overcrowding and the blighting of residential dwellings.

1 P. Rohan, *Zoning and Land Use Controls* § 1.02[6][c] (1993). Use restrictions, however, are associated with zoning provisions.

Zoning is the process by which a municipality legally controls the use which may be made of property Zoning ordinances are adopted to divide the land into different districts, and to permit only certain uses within each zoning district.

Id. at § 1.02[1].

(1991); *Columbia Pictures*, 866 F.2d at 280 n.4. "[T]he authoritative source for finding the Legislature's intent lies in the Committee Reports on the bill." *Garcia v. United States*, 469 U.S. 70, 76 (1984). Congress issued one report on the FHAA. It says:-

These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by

governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R. Rep. No. 711, 100th Cong. 2d Sess.
reprinted in 1988 U.S.C.C.A.N. 2173,
2192.

[2] Exempting Edmonds' zoning provision would contravene the Report's directive that exempted restrictions apply to all occupants. The House Report does, however, anticipate exempting Edmonds' occupancy restriction, which requires sleeping rooms to have a floor area of "not less than 70 square feet. . . ."

Uniform Housing Code (UHC) § 503(b), 1988 Edition.⁴

C. FHAA Policy

Courts should avoid an "unreasonable [result] 'plainly at variance with the policy of the legislation as a whole.'" *United States v. American Trucking*

⁴Edmonds employs both occupancy restrictions and use restrictions. ECDC § 19.10.000 incorporates the UHC, 1988 Edition.

Floor Area. Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

UHC § 503(b). The zone classifications in the ECDC, however, impose control through use restrictions. See ECDC § 16.20.010 (permitted primary and secondary uses in single-family residential zone).

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Ass'ns., 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)). "'We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act.'" *Columbia Pictures*, 866 F.2d at 280 n.4 (quoting *Richards v. United States*, 369 U.S. 1, 11 (1962)).

The House Report indicates that Congress intended the FHAA to apply to "local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps." 1988 U.S.C.C.A.N. at 2185. Congress intended to prohibit "terms or conditions . . . which have the effect of excluding, for example, congregate living arrangements for persons with handicaps." *Id.* at 2184. These include the "enforcement of otherwise

neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities." *Id.* at 2185.⁵

To effectuate this intent courts have applied the FHAA "where the application of a neutral [zoning] rule barred group homes of handicapped people from operating in certain areas." *Smith & Lee Assocs., Inc. v. Taylor*, No. 92-1903, slip op. at 19, 1993 U.S. App. LEXIS 33971, *30 (6th Cir. Dec. 30, 1993) (applied to single-family zone permitting nonprofit housekeeping units) (citing *Oxford House, Inc. v. Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992) (applied to single-family zone burdening unrelated persons)).

⁵Edmonds' ordinance is facially neutral because it treats handicapped and non-handicapped persons similarly.

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The FHAA imposes an affirmative duty to reasonably accommodate handicapped persons. 42 U.S.C. § 3604(f)(3)(B). Reasonable accommodation is borrowed from case law interpreting the Rehabilitation Act of 1973, 1988 U.S.C.C.A.N. at 2186 (citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979)). "[W]hile a [city] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones." *Alexander v. Choate*, 469 U.S. 287, 300 (1985).

Congress intended the FHAA to protect the right of handicapped persons to live in the residence of their choice in the community. 1988 U.S.C.C.A.N. at 2185. The FHAA was to "end the unnecessary exclusion of persons with handicaps from

the American mainstream." *Id.* at 2179. See *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) (question not whether any housing made available, but whether housing individual desired was denied on impermissible grounds); *Familystyle of St. Paul, Inc. v. St. Paul*, 923 F.2d 91, 94 (8th Cir. 1991) (Congress did not intend the FHAA to segregate mentally ill from social mainstream).

[3] Exempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHAA. Many cities in this country have adopted similar use restrictions. See *Elliott*, 960 F.2d at 980; *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1977). Applying the exemption would insulate these single-family residential zones from the sweep of FHAA requirements. Courts must ask

whether a city's zoning satisfies FHAA standards, or whether a city has to alter neutral zoning policies to reasonably accommodate and integrate handicapped persons. The answers will vary depending on the facts of a given case. But these questions must be posed, or the policies the FHAA seeks to enforce will be frustrated.

D. *Elliott v. Athens*

We disagree with the Eleventh Circuit's opinion in *Elliott*. That court held that section 3607(b)(1) exempted a zoning ordinance that permitted no more than four unrelated persons to reside in a single-family dwelling. *Elliott*, 960 F.2d at 980-81. A group home for recovering alcoholics and drug addicts had challenged the ordinance. *Id.* at 976.

The *Elliott* court recognized the constitutionality of use restrictions that limited occupancy in single-family residences to two unrelated persons, but any number of related persons. *Id.* at 980; see *Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974). The court reasoned that Congress could not have intended to apply the FHAA to *Belle Terre* use restrictions, which are constitutional and widely prevalent in the United States. *Elliott*, 960 F.2d at 980.⁶

⁶Conversely, it noted that a use restriction that limited occupancy to members of a single family, but excluded a grandmother living with a grandson, impermissibly intruded into family decisions and ran afoul of the Due Process Clause of the Fourteenth Amendment. *Moore*, 431 U.S. at 499. The Court has not, however, held an occupancy restriction that applies to all residents to be unconstitutional. In *Moore* the plurality opinion positively referenced such limits. It pointed out

[4] But the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance. The legislative history and purposes of the FHAA demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped

that East Cleveland has another ordinance specifically addressed to the problem of overcrowding. Section 1351.03 limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor area.

Moore, 431 U.S. at 500 n.7 (citation omitted). Emphasizing the apparent approval of such a regulation, Justice Stevens said, "[t]o prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space." *Id.* at 520 n.16 (Stevens, J., concurring).

persons. This can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances. Edmonds must satisfy the FHAA standards. Accordingly, we conclude that Edmonds' single-family use restriction is not exempted. Section 3607(b)(1) only exempts occupancy restrictions that apply to all occupants, whether related or not.

E. Conclusion

We voice no opinion as to whether Edmonds complied with the substantive standards of the FHAA. Because it exempted the zoning ordinance, the district court did not review the merits. Many factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved. We

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reverse and remand to the district court
for the necessary findings.⁷

REVERSED AND REMANDED.

⁷Attorneys' fees may not be awarded to Oxford House under 42 U.S.C. § 3613(c)(2). It must await the outcome of further proceedings.

APPENDIX B

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,

Plaintiff,

v.

WASHINGTON STATE
BUILDING CODE COUNCIL,
et al.,

Defendants.

NO. C91-215WD

JUDGMENT

UNITED STATES OF
AMERICA,

Plaintiff,

v.

CITY OF EDMONDS,

Defendant.

NO. C91-1273WD

In accordance with the Order on Cross-Motions for Summary Judgment entered herein, judgment is entered declaring that the five-person limit of the Edmonds Community Development Code, as applied to Oxford-House Edmonds, does not violate the

Fair Housing Act, 42 U.S.C. § 3601, et
seq.

Filed and entered this 15th day of
July, 1992.

BRUCE RIFKIN, Clerk

By Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,

Plaintiff,

NO. C91-215WD

v.

WASHINGTON STATE
BUILDING CODE COUNCIL,
et al.,

ORDER ON
CROSS-MOTIONS
FOR SUMMARY
JUDGMENT

Defendants.

UNITED STATES OF
AMERICA,

Plaintiff,

NO. C91-1273WD

v.

CITY OF EDMONDS,

Defendant.

I. PROCEDURAL BACKGROUND

On February 13, 1991, the cities of Edmonds, Washington, and Everett, Washington, filed suit seeking a declaratory judgment that their zoning ordinances which restrict the number of

ORD ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT -1

unrelated adults who may live in a single family residence do not impermissibly discriminate against disabled persons in violation of the Fair Housing Act ("FHA"), 42 U.S.C. § 3601, et seq. The controversy centered on Oxford House, Inc., an organization that had established in Edmonds, and sought to establish in Everett, a group residence for recovering drug addicts and alcoholics. Everett's claims were dismissed by stipulation on April 30, 1992. The remaining defendants in the Edmonds action are Herb Hamilton, Oxford House, Inc., and Oxford House-Edmonds (collectively the "Oxford House defendants"), and the Washington State Building Code Council.

On September 12, 1991, the United States filed a complaint alleging that the City of Edmonds had violated the FHA. On

September 26 the court consolidated the two actions.

Edmonds, the Oxford House defendants and the United States have moved for summary judgment. Oral argument was held on June 25, 1992. All materials filed in regard to the motions, and the arguments of counsel, have been fully considered.

II. UNDISPUTED FACTS

The "Joint Stipulations for Purposes of Dispositive Motions" include the following facts:

Oxford House-Edmonds is an unincorporated association operating under a charter issued by Oxford House, Inc., and is composed of the residents of a house at 8704 216th Street, S.W., in Edmonds, Washington. The residents are approximately ten to twelve recovering adult alcoholics and drug addicts. The

house is located within the area zoned "RS" (single-family residential) under the Edmonds Community Development Code ("ECDC"), which limits the number of unrelated persons living together in a dwelling in such an area to five.

The experience of Oxford House, Inc., has shown that eight to twelve residents are needed to achieve financial self-sufficiency and a supportive environment for recovery; Oxford House-Edmonds could not function with five or fewer residents.

III. ANALYSIS

A. SUMMARY JUDGMENT STANDARDS

Summary judgment under Fed. R. Civ. P. 56 may be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. An issue of material fact is one that affects the outcome of the

case and requires a trial to resolve differing versions of the truth. Admiralty Fund v. Hugh Johnson & Co., 677 F.2d 1301, 1305-06 (9th Cir. 1982). In deciding the motion the court views the evidence in the light most favorable to the non-moving party, and draws all reasonable inferences in that party's favor. Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630-31 (9th Cir. 1987). However, the non-moving party must respond to an adequately supported motion by showing that a genuine issue of material fact exists; if the response falls short of that, summary judgment should be granted. Fed. R. Civ. P. 56(e); T.W. Elec. Serv., Inc., 809 F.2d at 630-31.

ORD ON CROSS-MOTIONS
FOR SUMMARY JUDGMENT -5

Here, there is no genuine issue of material fact for trial, and the case may be decided on the cross-motions for summary judgment.

B. "REASONABLE ACCOMMODATIONS"

The FHA makes it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." 42 U.S.C. § 3604(f)(1). As the parties agree, recovering alcoholics and drug addicts are handicapped within the meaning of the statute. Under 42 U.S.C. § 3604(f)(3)(B), discrimination against a handicapped person includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling."

A "reasonable accommodation" could be made here, for example, by the City of Edmonds agreeing to waive the five-person limit as to Oxford House-Edmonds. The question, however, is whether the requirements of §§ 3604(f)(1) and 3604 (f)(3)(B) apply in the first place, in view of the exemption discussed below.

C. EXEMPTION FOR MAXIMUM OCCUPANCY RESTRICTIONS

The FHA provides that "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Under the plain language of this exemption, the ECDC's limit of five unrelated persons to a dwelling is a "restriction regarding the maximum number of occupants." Nothing in

the legislative history of the FHA requires a different interpretation. See Elliott v. City of Athens, Georgia, 960 F.2d 975, 979-81 (11th Cir. 1992).

The United States contends that the exemption is nevertheless inapplicable because the five-person limit is not "reasonable" within the meaning of § 3607(b)(1), in that Edmonds has failed to make "reasonable accommodations" under § 3604(f)(3)(B). Such an interpretation of "reasonable" must be rejected because it would render § 3607(b)(1) superfluous. See Central Mont. Elect. Power Co-op., Inc. v. Administrator, Bonneville Power Admin., 840 F.2d 1472, 1478 (9th Cir. 1988).

No other ground has been suggested, and none appears in the record, for a finding that the five-unrelated-person

limit is not "reasonable." Among the stated purposes of the ECDC's residential zoning rules are "to preserve . . . [f]reedom from air, water, noise and visual pollution[,] . . . [t]o minimize traffic congestion and avoid the overloading of utilities[,] . . . [and] [t]o protect residential uses from hazards and nuisances." ECDC 16.10.000. The Supreme Court has upheld occupancy restrictions for such purposes, even when the number of unrelated persons in a dwelling is limited to two. Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Edmonds cannot be faulted for exempting related persons from the five-person limit; such a restriction on traditional families would probably violate the Due Process Clause of the Fourteenth Amendment. See Moore v. City of East

Cleveland, Ohio, 431 U.S. 494 (1977). The Eleventh Circuit has upheld, against the claims of a proposed group home for recovering alcoholics, the reasonableness of an ordinance limiting to four the number of unrelated persons who could occupy a single residence. See Elliott, supra, 960 F.2d at 981-84.

On the record here, Edmonds' five-unrelated-person limit is reasonable as a matter of law under § 3607(b)(1), and is therefore exempt from the "reasonable accommodations" requirement of § 3604(f)(3)(B).

D. CONCLUSION

For the reasons stated, the summary judgment motion of the City of Edmonds is granted and the motions of the Oxford House defendants and of the United States

are denied. The clerk is directed to enter judgment accordingly.

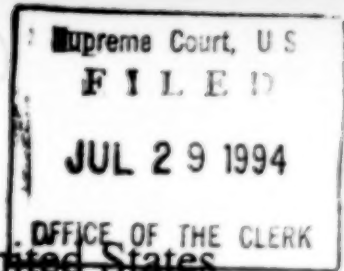
The clerk will send copies of this order to all counsel of record.

Dated: July 14, 1992.

William L. Dwyer
United States District Judge

(3)
No. 94-23

IN THE
Supreme Court of the United States



October Term, 1993

CITY OF EDMONDS,

Petitioner,

vs.

WASHINGTON STATE BUILDING CODE
COUNCIL, et al.,

Respondents

On Petition for a Writ of Certiorari
to the
United States Court of Appeals
for the Ninth Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS
OXFORD HOUSE, INC., OXFORD HOUSE EDMONDS
AND HERB HAMILTON

Robert I. Heller*
Douglas H. Fleming
Riddell, Williams, Bullitt
& Walkinshaw
Attorneys for Respondents
and
Cooperating Counsel of the
American Civil Liberties Union
of Washington
1001 4th Avenue Plaza, Suite 4400
Seattle, Washington 98154
(206) 624-3600
* Counsel of Record

July 29, 1994

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No. 94-23

IN THE
Supreme Court of the United States

October Term, 1993

CITY OF EDMONDS,

Petitioner,

vs.

WASHINGTON STATE BUILDING CODE
COUNCIL, et al.,

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Robert I. Heller*
Douglas H. Fleming
Riddell, Williams, Bullitt
& Walkinshaw
Attorneys for Respondents
and
Cooperating Counsel of the
American Civil Liberties Union
of Washington
1001 4th Avenue Plaza, Suite 4400
Seattle, Washington 98154
(206) 624-3600
* Counsel of Record

July 23, 1994

QUESTION PRESENTED

The Fair Housing Amendments Act of 1988 (the "FHAA") exempts from its mandates "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C.

§ 3607(b)(1). The City of Edmonds' zoning code places no limit on the number of related persons allowed to live together in a single-family zone, but restricts the number of unrelated persons allowed to live together in that zone to no more than five, regardless of the size of the dwelling.

The question presented is whether the City's zoning provision falls within the FHAA's exemption for reasonable maximum occupancy standards.

LIST OF PARTIES AND RULE 29.1 LIST

City of Edmonds, Washington

United States of America

Oxford House-Edmonds

Oxford House, Inc.¹

Herb Hamilton

Parties Dismissed²

¹Oxford House, Inc. has no parent or subsidiary companies.

²The following parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 18 F.3d 802 (9th Cir. 1994). The opinion of the district court (Pet. App. B) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1994. The petitioners have invoked the jurisdiction of this Court under 28 U.S.C. 1254(1).

STATUTES INVOLVED

The Fair Housing Amendments Act of 1988 42 U.S.C. § 3601 et seq. and City of Edmonds Community Development Code sections involved appear in the petition (Pet. 2 - 8). The applicable Washington State statute RCW 35A.63.240 is set forth on pages 13, 14 herein.

STATEMENT OF THE CASE

Procedural History

On February 14, 1991 the City of Edmonds filed a declaratory judgment action seeking a determination that its single-family zoning rule barring five or

more unrelated persons from living in Oxford House Edmonds does not discriminate on the basis of handicap in violation of the Fair Housing Amendments Act, as amended, 42 U.S.C. § 3601 et seq. (hereinafter the "FHAA" or the "Act").
City of Edmonds v. United States Department of Housing and Urban Development, No. C-91-215 WD (Western District of Washington).

On September 12, 1991, the United States filed its complaint alleging that the City had violated the Act by refusing to make a reasonable accommodation necessary to afford handicapped persons an equal opportunity to use and enjoy a dwelling. United States v. City of Edmonds, No. C91-1273WD (Western District of Washington). On cross motions for

summary judgment, the court granted the City's motion for summary judgment and denied the motions filed by the respondents (hereinafter collectively "Oxford House") and by the United States. The same day the court entered final judgment on its order pursuant to Fed. R. Civ. P. 54(b), holding that the Edmonds single-family zoning law was exempt from the Fair Housing Act, 42 U.S.C. 3601 et seq. Oxford House filed a motion for reconsideration on July 17, 1992; the court denied the motion on July 22, 1992.

On August 12, 1992, Oxford House filed a notice of appeal. The United States of America filed a notice of appeal on September 14, 1992. By stipulation of the parties, the appeals

were consolidated pursuant to Fed. R. App. 3(b).

The Ninth Circuit Court of Appeals reversed the district court and found that the Act did not exempt Edmonds' zoning ordinance from the statute's prohibition against discrimination based on handicap. It reasoned that exempting the City's zoning provision would undermine a principal purpose of the FHAA, which is to require reasonable accommodation in zoning laws when necessary to provide disabled persons with reasonable access to housing opportunities.

Facts

Oxford House Edmonds is a leased six-bedroom house where 10-12 recovering

adult alcoholics and drug addicts reside in Edmonds, Washington. The residents are 'handicapped' persons under the FHAA's statutory definition. 42 U.S.C. § 3602(h). Oxford House Edmonds is one of 17 recovery houses in Washington state. It operates under a charter issued by Oxford House, Inc., and in compliance with the provisions of the Anti-Drug Abuse Act, 42 U.S.C.A. 300x-25 (ADAA), which provides start-up loans for houses meeting the ADAA requirements for non-use of alcohol and drugs, self-support and democratic operation.

Oxford House Edmonds is self-supporting and democratically governed. Its rules require expulsion of any resident who uses alcohol or drugs. Under the Oxford House approach, members

provide counseling and mutual support to each other. The residence operates like a family. The Oxford House approach has been so effective that Congress adopted the Oxford House model as the pattern for self-run, self-financed recovery houses across the country in the ADAA.

The parties stipulated that Oxford House Edmonds cannot viably operate at its current location in Edmonds and at the same time comply with the zoning limitation of 5 unrelated persons. The house must have enough residents to provide a supportive atmosphere for successful recovery, to ensure financial self-sufficiency, and to comply with federal requirements for the receipt of state start-up loans. 42 U.S.C. 300x-25.

The house must also be close to public transportation and located in a good residential neighborhood, away from commercial zones, liquor stores, and areas associated with opportunities for alcohol and drug abuse.

In the summer of 1990, Mark Spence, an Oxford House outreach worker under contract with the Washington Division of Alcohol and Substance Abuse, was in Edmonds to locate a suitable location for Oxford House Edmonds. After looking at several homes within the City, Mr. Spence chose the house at 8704-216th Street SW because it met the established criteria. The house has six bedrooms, is located in a good single-family neighborhood, and is close to a bus line. The parties have stipulated that Oxford House Edmonds'

actual impact on City services and infrastructure is not qualitatively or quantitatively different from the impact of a household of related persons, of the same age and number, in the same location.

Because Oxford House Edmonds is located in a "single family" zone, the Edmonds Community Development Code (ECDC) limits the occupancy of the home to a "family", which the ECDC defines as any number of persons related by adoption, marriage, or genetics, or a group of five or fewer unrelated persons.

ECDC § 21.30.010.

Because its members are not a "family" under the ECDC definition, use of the house by Oxford House Edmonds as a residence for more than 5 unrelated

persons violates the ECDC. Despite a request by Oxford House Edmonds, the City declined to make a reasonable accommodation in its zoning ordinance that would have allowed Oxford House Edmonds to remain in its chosen location.

REASONS FOR DENYING THE WRIT

The question presented is now moot due to an intervening change in state law. The Ninth Circuit opinion was clearly correct and the inter-circuit conflict noted by petitioner seems to be working its way out as almost every other decision addressing this issue has come to the conclusion reached by the Ninth Circuit below.

I. Resolving the Conflict Would Not Affect the Outcome in this Case Due to an Intervening Change in State Law

The Supreme Court should deny certiorari because the Supreme Court resolution of the conflict between the circuits will not affect the outcome between the parties. Sommerville v. United States, 376 U.S. 909 (1964).

RCW 35.63A is the state statute governing the City of Edmonds' planning and zoning authority, Petition p. 11. Due to a recent amendment to this statute, the City is now prohibited by state law from maintaining any zoning ordinance that treats handicapped persons differently than it treats families. RCW 35A.63.240. This amendment to state law occurred after briefing was complete before the Ninth Circuit, and the state

law issue was not addressed in the Ninth Circuit determination.

By Washington State Senate Bill 5584, effective July 25, 1993, the Washington state legislature added a new section to chapter 35A.63 RCW to read as follows:

No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, "handicaps" are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3602).

RCW 35A.63.240.

Thus, regardless of the outcome of this case, the City of Edmonds must under state law provide equal treatment in its

zoning rules to handicapped persons and families. The Supreme Court should deny certiorari because it cannot grant the petitioners the effectual relief they seek.

The Supreme Court should deny certiorari even assuming arguendo that the issue might conceivably affect the rights of others in states which have not adopted a similar state law. As this Court unanimously held Tiverton Bd. Of License Comm'rs v. Pastore, 469 U.S. 238 (1985): "Such speculative contingencies afford no basis for our passing on the substantive issues [the petitioner] would have us decide, in the absence of 'evidence that this is a prospect of immediacy and reality.'" Id. at 240 (citations omitted).

II. The Ninth Circuit Opinion Is Clearly Correct.

The Ninth Circuit decision in City of Edmonds correctly recognized that Congress intended to apply the Fair Housing Amendments Act to widely prevalent zoning rules that have been found constitutional, and hence to grant additional protections to disabled persons. Congress has the power to confer greater rights than afforded by the constitution. Fitzpatrick v. Bitzer, 427 U.S. 445 (1976).

In the FHAA Congress explicitly gave greater protection to the disabled than the constitution alone provides. As the Petitioner observes, the constitution permits cities to drastically limit the number of unrelated people who can live together in single-family zones. Village

of Belle Terre v. Boraas, 416 U.S. 1

(1974) (zoning rule barring more than two unrelated persons from occupying a single-family-zoned dwelling is not unconstitutional). The Ninth Circuit properly recognized that Congress could not have intended to totally exempt from FHAA scrutiny zoning use classifications³ that can have devastating impact upon housing opportunities for disabled persons.

Petitioner expresses concern that the Ninth Circuit interpretation of the

³A different type of occupancy limit, which relates the maximum number of occupants to the amount of space in a room or dwelling, and can constitutionally be applied to all persons whether related or not, is the type of occupancy limit that § 3607(b)1 exempts from FHAA scrutiny. City of Edmonds, 18 F.3d at 804-05. See also City of St. Louis, 843 F. Supp. at 1573-74.

FHAA exemption will "overturn single-family zoning." Petition p. 23. This is not the case. The validity of single-family zoning has not been challenged. The general applicability of limits on unrelated people living together in single-family zones is not in question. The Ninth Circuit decision means only that such zoning use classifications are subject to FHAA review to assure that they do not discriminate against persons with disabilities.

III. The Great Majority of Courts Are Not Following the Eleventh Circuit Position.

This court should not grant the petition for writ of certiorari based on conflict between the Ninth and Eleventh Circuits because whatever conflict exists is being worked out in the lower courts.

Even prior to the Ninth Circuit decision, three lower courts that have addressed this issue have criticized and declined to follow the position set forth in Elliot v. City of Athens, 960 F.2d 975 (11th Cir. 1992) cert. denied, 113 S. Ct. 376 (1992) concerning the § 3607(b)(1) exemption.⁴ These courts carefully considered the 42 U.S.C. § 3607(b)(1)

⁴Petitioner exaggerates the conflict that does exist. It contends that Doe v. City of Butler, 892 F.2d 315 (3rd Cir. 1989) and Familytime of St. Paul, Inc. v. City of St. Paul, Minn., 728 F. Supp. 1396 (Minn. 1990), aff'd, 923 F.2d 91 (8th Cir. 1991) conflict with the Ninth Circuit decision below in the present case. (Pet. 24) This is not correct. Those two decisions address only the constitutionality of occupancy restrictions and do not address their validity under the FHAA. There is therefore no conflict between these cases and the Ninth Circuit decision on the question posed by the Petitioner - the proper interpretation of the 3607(b)(1) exemption in the Fair Housing Amendments Act.

exemption and rejected the Eleventh Circuit's interpretation. See Oxford House v. City of St. Louis, 843 F. Supp. 1556, 1573-75 (E.D. Mo. 1994); Oxford House v. City of Virginia Beach, 825 F. Supp. 1251, 1258-59 (E.D. Va. 1993); Parish of Jefferson v. Allied Health Care, Inc., 1992 WL 142754 (E.D. La. 1992). See also Cox et al. v. Township of Upper St. Clair, No. 93-1443 (W.D. Pa. May 18, 1994) (memorandum decision denying motion to dismiss) (criticizing Elliot).

The only support for the Eleventh Circuit position is an unreported one and one-half page order on summary judgment from the Northern District of Texas. Elderhaven, Inc. v. City of Lubbock, No. 5:92-CV-136-C (N.D. Tex. June 14,

1994) (order granting summary judgment). Without any analysis of Elliot's interpretation of FHAA § 3607(b)(1) and without reference to the Ninth Circuit decision in City of Edmonds, the order states a summary conclusion that Lubbock's ordinance is a reasonable restriction regulating the number of occupants who may occupy a dwelling. This decision has been appealed to the Fifth Circuit Court of Appeals.

Thus, almost every court to address the issue since Elliot, including the Ninth Circuit, has decided that the Eleventh Circuit position is incorrect. (It would not be surprising if the Eleventh Circuit were to revise its position to conform the majority view when it next considers this issue).

Review in this Court is not required because the lower courts are resolving the issue themselves.

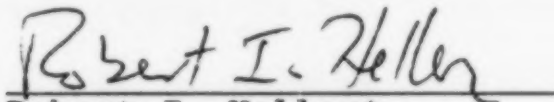
Finally, the pendency of two circuit court appeals on this same issue—combined with the state law question now presented in this case—weigh in favor of allowing more time to pass before accepting review. The City of St. Louis case has been appealed to the Eighth Circuit Court of Appeals, and the Elderhaven v. City of Lubbock case had been appealed to the Fifth Circuit. These will be the first appeals courts to weigh the Ninth Circuit position in City of Edmonds against the Eleventh Circuit position in Elliot. Unless the conflict further develops through divergent opinions in these

future cases, there is no need for the Supreme Court to grant review. And, if review does become appropriate in the future, the case chosen for review would not have the state law question that necessarily affects the outcome of this case.

CONCLUSION

The petition for a writ of
certiorari should be denied.

Respectfully submitted,



Robert I. Heller*
Douglas H. Fleming

Riddell Williams
Bullitt & Walkinshaw
Suite 4400
1001 4th Avenue Plaza
Seattle, Washington 98154
(206) 624-3600
Attorneys for Respondents
and
Cooperating Counsel
of the American Civil
Liberties Union of
Washington

* Counsel of Record

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SEP 10 1904
U.S. DEPT. OF JUSTICE
In the Supreme Court of the United States

OCTOBER TERM, 1904

CITY OF EDMONDS, PETITIONER

v.

WASHINGTON STATE BUILDING CODE COUNCIL
AND
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

DREW H. DAVIS III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

DAVID R. FLYNN
RICHARD A. TROTH

Attorneys
Department of Justice
Washington, D.C. 20530

117-5
BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a municipal zoning ordinance, which limits the number of unrelated but not the number of related persons who may live together in a single-family residential zone, falls within the Fair Housing Act's exemption for "reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS, PETITIONER

v.

WASHINGTON STATE BUILDING CODE COUNCIL
AND
UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 18 F.3d 802. The opinion of the district court (Pet. App. 1b-13b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1994. The petition for a writ of certiorari was filed on June 13, 1994 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Oxford Houses are group homes for persons recovering from alcoholism or drug addiction. Pet. App. 8a.¹ They operate under rules providing for democratic self-governance, financial self-sufficiency, and immediate expulsion of any resident found to have used alcohol or drugs. *Id.* at 9a; see 42 U.S.C. 300x-25(a)(6) (Supp. IV 1992). Those three basic rules are therapeutically based, and their efficacy has not been contested in this litigation.

The experience of Oxford House, Inc., has shown that eight to twelve residents are generally needed for Oxford Houses to function successfully, and the parties stipulated that Oxford House-Edmonds, the home involved in this case, cannot run effectively with fewer than six residents. Pet. App. 9a, 6b; cf. 42 U.S.C. 300x-25(a)(1) (Supp. IV 1992) (providing federal funding for homes for groups of not less than six recovering substance abusers). A minimum of six residents ensures that any resident experiencing problems related to his or her recovery is likely to find another resident at home to provide emotional support. Pet. App. 9a, 6b. The minimum number of residents needed in a given house also depends on the number of equal shares into which the total household expenses must be divided in order to make the expenses affordable to persons working at or near the minimum wage. *Ibid.*

¹ To facilitate reference to the opinions below, we have numbered the pages of petitioner's appendices consecutively, beginning with the first unnumbered page following each appendix cover page. References to Appendix A (court of appeals opinion) are in the form Pet. App. __a, and references to Appendix B (district court opinion) are in the form Pet. App. __b.

In 1988, Congress amended the Fair Housing Act (FHA) to prohibit discrimination in housing against persons with handicaps. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a) and (b)(1), 102 Stat. 1620-1622. The purpose of the amendment was to "end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988). The amendment applies to persons recovering from alcoholism and drug addiction to the same extent it does to persons with other handicaps, provided those persons are not engaged in "current, illegal use of or addiction to a controlled substance." 42 U.S.C. 3602(h). The amendment makes it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of * * * that buyer or renter." 42 U.S.C. 3604(f)(1)(A). Prohibited discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B).

Also in 1988, Congress enacted Section 2036 of Title II of the Anti-Drug Abuse Act of 1988 to encourage the development of Oxford Houses and similar group homes. Pub. L. No. 100-690, 102 Stat. 4202, 42 U.S.C. 300x-4a (repealed), codified in current form at 42 U.S.C. 300x-25 (Supp. IV 1992). The legislation requires States receiving certain federal block grants to make loans to help establish group homes for former substance abusers. It reflects the view that "after detoxification and in-patient rehabilitation many [people] need to live in an alcohol and drug free environment for some time in order to avoid relapse," and that Oxford Houses "provide the kind of support necessary for [these] individuals." 134 Cong.

Rec. E3732 (daily ed. Nov. 10, 1988) (remarks of Rep. Madigan). To qualify for a loan under the Act, a group home must have at least six residents who agree to abide by the three basic Oxford House rules. 42 U.S.C. 300x-25(a)(1) and (6) (Supp. IV 1992). Washington State receives federal block grant funds that subject it to the obligations of Section 300x-25.

2. Oxford House-Edmonds was established pursuant to the Anti-Drug Abuse Act of 1988. It operates under a charter issued by Oxford House, Inc., and it leases a house in Edmonds, Washington. Approximately 10 to 12 persons recovering from alcohol or drug addiction live there as a single housekeeping unit. Pet. App. 8a-10a. The parties stipulated in the district court that the residents of Oxford House-Edmonds are handicapped within the meaning of the FHA. The house is in a residential neighborhood, removed from "commercial zones, liquor stores, and illicit drug activity to minimize the likelihood of a relapse by a resident." *Id.* at 9a. Under petitioner's zoning code, the neighborhood is zoned single-family residential, so that only a "family" may occupy a residential structure in that area. *Id.* at 10a, citing Edmonds Community Development Code (ECDC) § 16.20.010. The zoning code defines "family" as any number of persons related by adoption, marriage or genetics, or five or fewer unrelated persons. ECDC § 21.30.010 (*reproduced at* Pet. 8). Because Oxford House-Edmonds needs six or more people to operate and to qualify for federal funding, it cannot comply with the zoning code's unrelated-persons rule.² The parties

² Ordinances such as Section 21.30.010 are commonly referred to as "unrelated-persons rules"—a specific type of use restriction—in order to differentiate them from occupancy restrictions. Unrelated-persons rules are aimed at achieving a particular

stipulated, however, that the impact on city services and infrastructure of Oxford House-Edmonds is no different from the impact of an equally numerous group of related persons of the same age at the same location.

3. After learning that an Oxford House had located in Edmonds, petitioner issued criminal citations to the owner and one of the residents of the house for violating the unrelated-persons provision of the zoning code. Pet. App. 10a.³ Petitioner also sought a declaratory judgment in federal district court that its unrelated-persons rule was exempt from the FHA. *Id.* at 11a. Respondent counterclaimed, seeking declaratory and injunctive relief, damages, and civil penalties based on petitioner's failure to make an accommodation for the Oxford House under Section 804(f)(3)(B) of the FHA, 42 U.S.C. 3604(f)(3)(B). The United States filed a separate action

neighborhood character. Occupancy restrictions, on the other hand, control population density within structures to ensure the health and safety of the occupants. See Pet. App. 21a n.4. 27a n.6. Petitioner has adopted the occupancy restrictions of the Uniform Housing Code (UHC). Pet. App. 21a n.4, citing ECDC § 19.10.000. Section 503(b) of the UHC requires that "[e]very dwelling unit shall have at least one room which shall have not less than 120 square feet," that other rooms, including bedrooms, must have an area of at least 70 square feet, and that "[w]here more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." Pet. App. 21a n.4. Respondents do not contest the applicability of those occupancy restrictions to Oxford House-Edmonds, and there is no question that respondents have fully complied with them.

³ Petitioner later voluntarily suspended its criminal enforcement actions pending resolution of this litigation. Pet. App. 10a-11a. It refused, however, to make an accommodation so that Oxford House-Edmonds could continue to operate on a permanent basis. *Id.* at 11a.

on the same grounds as contained in the counterclaim, and the two cases were consolidated. Pet. App. 11a-12a.

On cross-motions for summary judgment, the district court granted judgment for petitioner. Pet. App. 1b-13b. The court held that petitioner's unrelated-persons rule was exempt from scrutiny under the FHA as a "reasonable * * * restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1). Pet. App. 9b-12b. The court concluded that the "plain language of this exemption" encompassed the unrelated-persons rule and that "[n]othing in the legislative history of the FHA require[d] a different interpretation." *Id.* at 9b-10b. The court also concluded that petitioner's five-person limit was a "reasonable" occupancy limit because it advanced municipal zoning interests. *Id.* at 11b. Finally, it concluded that petitioner "cannot be faulted for exempting related persons" from its five-person limit, because "such a restriction on traditional families would probably violate the Due Process Clause of the Fourteenth Amendment." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-30a. The court noted first that the FHA should be construed "generously," Pet. App. 13a, citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972), and that the exemptions to the coverage of such a "broad remedial statute" must be read narrowly, Pet. App. 13a, citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The court held that the ordinance was not clearly covered by the exemption applicable to "restrictions regarding the maximum number of occupants," because although the ordinance restricts the number of unrelated persons who can live together, it "does not regulate the maximum number of related occupants." Pet. App. 17a.

The court of appeals held that the legislative history of the exemption resolved all doubts about whether the challenged ordinance is exempted from the FHA. Pet. App. 18a-21a. It noted that Congress intended Section 3607(b)(1) to exempt only restrictions that apply uniformly to "all occupants," not rules that differentiate between related and unrelated occupants. Pet. App. 19a-21a, citing H.R. Rep. No. 711, *supra*, at 31. The court pointed to petitioner's occupancy restriction requiring that bedrooms have a floor area of at least 70 square feet as an example of a rule that applies to all occupants and that is exempt from the FHA under Section 3607(b)(1). Pet. App. 20a-21a & n.4, citing ECDC § 19.10.000.

The court of appeals concluded that its reading of the exemption was supported by the FHA's purpose "to protect the right of handicapped persons to live in the residence of their choice in the community." Pet. App. 24a, citing H.R. Rep. No. 711, *supra*, at 24. As the court explained,

[e]xempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHAA. Many cities in this country have adopted similar use restrictions. Applying the exemption would insulate these single-family residential zones from the sweep of FHAA requirements.

Pet. App. 25a (citations omitted).⁴ The court held that zoning decisions under ordinances like petitioner's must be subjected to review under the FHA, "or the policies

⁴ The court of appeals referred to both the Fair Housing Act and the Fair Housing Amendments Act of 1988 as "FHAA." Except in quotations to the court of appeals' opinion, however, we refer herein to the Act, as amended, as "FHA."

the FHAA seeks to enforce will be frustrated." *Id.* at 26a.

Finally, the court of appeals disagreed with the Eleventh Circuit's application of the exemption in *Elliott v. City of Athens*, 960 F.2d 975, cert. denied, 113 S. Ct. 376 (1992). Pet. App. 26a-29a. It rejected *Elliott's* reasoning that Congress could not have intended to apply the FHA to unrelated-persons rules because such rules are constitutional under *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Pet. App. 27a. In the court's view,

the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance.

Id. at 28a. The FHA's requirements that a city's zoning policies reasonably accommodate handicapped persons can, the court held, exceed the constitutional floor, "requir[ing] something more than the enactment of minimally constitutional and facially neutral zoning ordinances." *Id.* at 29a. The court remanded the case to the district court for evaluation of whether petitioner had complied with the FHA. *Id.* at 29a-30a.

5. On May 17, 1993, after briefing on appeal, Washington State enacted a law that makes the unrelated-persons rule of petitioner's zoning code invalid as applied to a "residential structure occupied by persons with handicaps," such as Oxford House-Edmonds. The new statute, which became effective on July 25, 1993, provides:

No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons

with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, "handicaps" are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3602).

Wash. Rev. Code Ann. § 35A.63.240 (West Supp. 1994). The new state statute prevents petitioner from using its single-family zoning ordinance to bar groups of disabled residents from living together as a household unit at Oxford House-Edmonds.

ARGUMENT

Despite the existence of a circuit conflict, this case is not an appropriate vehicle for determining whether petitioner's unrelated-persons rule is a reasonable occupancy restriction exempt from the Fair Housing Act (FHA). After this case was briefed in the Ninth Circuit, Washington State enacted a law that invalidates petitioner's zoning ordinance for reasons independent of the question presented here. Review would also be premature because the Ninth Circuit resolved only the threshold issue of FHA coverage and remanded for a determination of whether any accommodation is, in fact, required by the FHA. In addition, other cases now pending in the lower courts may reach a consensus rejecting *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992), which is the only reported decision contrary to the court of appeals' correct holding below.

1. The recently enacted Washington Housing Policy Act, see Wash. Rev. Code Ann. § 35A.63.240 (West Supp. 1994), prohibits the enforcement of zoning ordinances such as petitioner's single-family zoning provision against Oxford Houses and similar facilities. The chief practical interest petitioner asserts in favor of review is

that, in its view, the court of appeals' decision prohibits it from engaging in traditional single-family residential zoning. Pet. 18-20, 22-24. The new Washington law, however, prohibits petitioner from enforcing its single-family zoning rule against Oxford House-Edmonds as a matter of state law. Edmonds Community Development Code (ECDC) § 21.30.010 allows a family of more than five persons "related by genetics, adoption, or marriage" to live together in an area zoned single-family residential. It does not allow a household of the same number of unrelated disabled persons, such as Oxford House-Edmonds, in the same area. The ordinance thus "treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family," and accordingly is invalid under Section 35A.63.240 of the Washington Revised Code. Therefore, even if the decision of the court of appeals were reversed, petitioner would be unable under state law to enforce its zoning ordinance against Oxford House-Edmonds. The question petitioner seeks to present is thus not raised "in the context of meaningful litigation," and its resolution should "await a day when the issue is posed less abstractly." *The Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).⁵

⁵ Petitioner's contention that "[t]he Ninth Circuit decision in this case would remove the basic zoning block of single family residential zoning," Pet. 22-23, is incorrect. Application of the FHA would not invalidate single-family zoning ordinances or unrelated-persons rules. Rather, it would require localities to make reasonable accommodation for groups of unrelated disabled persons. Moreover, accommodation is not required by the FHA where it would impose an undue burden on a municipality, cf. *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n.17 (1987); *Alexander v. Choate*, 469 U.S. 287, 299-301 (1985);

2. Petitioner asserts (Pet. 21-22) that the decision of the court of appeals conflicts with decisions of the Third, Eighth, and Eleventh Circuits. In addition to the Ninth Circuit, however, only the Eleventh Circuit has addressed whether unrelated-persons rules are exempted from review under the FHA, 42 U.S.C. 3607(b)(1).⁶ *Elliott v. City of Athens*, *supra*, was the first case to decide the issue, and remains the lone appellate opinion applying the exemption to such rules.⁷ Several district courts in other jurisdictions have criticized *Elliott*, declined to follow it, and instead adhered to *Edmonds*. See *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1573-1575 (E.D. Mo. 1994), appeal docketed, No. 94-1600 (8th Cir.

Southeastern Community College v. Davis, 442 U.S. 397, 412 (1979), or require it to change the fundamental nature of its zoning scheme, cf. *Davis*, 442 U.S. at 410.

⁶ The FHA exemption was not at issue in either of the other cases cited by petitioner. Pet. 22. The court in *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991), subjected state and local laws prohibiting placement of group homes for persons who are mentally ill and retarded within 1320 feet of other such homes to FHA review, and upheld the laws as nondiscriminatory efforts to benefit disabled persons by ensuring their integration rather than continued cloistering and ghettoization. The court in *Doe v. City of Butler*, 892 F.2d 315 (3d Cir. 1989), held that an ordinance limiting to six the number of residents in transitional dwellings did not discriminate based on sex, but remanded the claim of family-status discrimination to determine whether the ordinance has "a general dampening effect on the ability of women with children to take advantage of transitional dwellings." *Id.* at 324.

⁷ There is one unreported district court order citing *Elliott* but not *Edmonds* and granting summary judgment without further analysis in favor of the defendant city. *Elderhaven, Inc. v. City of Lubbock*, No. 5:92-CV-136-C (N.D. Tex. June 14, 1994), appeal docketed, No. 94-10648 (5th Cir. July 14, 1994).

Mar. 8, 1994); *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251, 1258-1259 (E.D. Va. 1993); see also *Parish of Jefferson v. Allied Health Care, Inc.*, Nos. Civ. A. 91-1199, 91-1200 & 91-3959, 1992 WL 142574 (E.D. La. June 10, 1992). The question should await further consideration by the lower courts, see *McCray v. New York*, 461 U.S. 961, 962 (1983) (opinion of Stevens, J., respecting the denial of certiorari), in light of the prospect that a satisfactory consensus may emerge and the conflict abate without the need for review by this Court.

3. The procedural posture of this case also counsels against granting the petition. The court of appeals "voice[d] no opinion as to whether [petitioner] complied with the substantive standards of the FHAA." Pet. App. 29a. It instead remanded to the district court for factual findings on the merits, commenting that "[m]any factors must be weighed to determine whether reasonable accommodation under 42 U.S.C. § 3604(f)(3)(B) was achieved." *Ibid.*⁸ The additional proceedings below may obviate the need for review. For this reason, this Court's review should be deferred until after final judgment. See *Virginia Military Institute v. United States*, 113 S. Ct. 2431 (1993) (opinion of Scalia, J., respecting the denial of certiorari); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Petitioner would not be "preclude[d] * * * from raising the same

⁸ As noted, Section 35A.63.240 of the Washington Revised Code was not enacted until after briefing on appeal, and the Ninth Circuit's opinion below does not address it. Although the new state law effectively makes injunctive relief unnecessary, respondents' claims for declaratory relief, damages, penalties and fees remain for determination on remand.

issues in a later petition, after final judgment has been rendered." *Virginia Military Institute*, 113 S. Ct. at 2432 (opinion of Scalia, J., respecting the denial of certiorari).

4. At all events, the court of appeals' decision is correct. Petitioner argues (Pet. ii) that its unrelated-persons rule is exempt from the requirements of the FHA as a "reasonable * * * restriction[] regarding the maximum number of occupants" under 42 U.S.C. 3607(b)(1). As the court of appeals noted, however, ECDC § 21.30.010 is not what is commonly referred to as an "occupancy" restriction, but rather is a "use" restriction. Pet. App. 17a n.3, 21a n.4. See note 2, *supra*. By its terms the FHA exemption applies only to occupancy restrictions.

The House Report on the Fair Housing Amendments Act of 1988 confirms Congress's intent not to exempt unrelated-persons rules. Pet. App. 18a-21a. As the court of appeals noted, the House Report describes the exemption as covering only occupancy restrictions that apply equally to "all occupants." *Id.* at 20a.⁹ Petitioner's

⁹ The House Report explains:

Section 6(d) amends Section 807 to make additional exemptions relating to the familial status provisions. These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to *all occupants*, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

requirements of 70 square feet for the first two persons occupying a bedroom and 50 square feet for every additional person are such uniformly applicable restrictions. See Pet. App. 21a n.4, citing ECDC § 19.10.000 (incorporating Section 503(b) of the Uniform Housing Code (1988 Edition)). In contrast, ECDC § 21.30.010 does not apply to all occupants, but makes a distinction between related and unrelated persons. The court of appeals thus correctly concluded that “[e]xempting Edmonds’ zoning provision [ECDC § 21.30.010] would contravene the [House] Report’s directive that exempted restrictions apply to all occupants.” Pet. App. 20a. There is no evidence that Congress intended to exempt rules that cap the number of unrelated persons but not the number of related family members who may live in a dwelling.¹⁰

H.R. Rep. No. 711, *supra*, at 31 (emphasis added in part), quoted in part at Pet. App. 19a-20a.

The House Report describes the exemption as “relating to the familial status provisions.” H.R. Rep. No. 711, *supra*, at 31. The impetus for the exemption was to make sure that, notwithstanding the new prohibition of discrimination on the basis of familial status also added in the 1988 Amendments, see Pub. L. No. 100-430, §§ 5(b), 6(b)(1) and (2), 102 Stat. 1620, 1622 (codified at 42 U.S.C. 3602(k), 3604), governments would retain the authority to apply true occupancy restrictions to families. Congress viewed occupancy rules as a circumstance “where limitations on children in housing units may be valid.” 133 Cong. Rec. 3755 (1987) (remarks of Sen. Metzenbaum).

¹⁰ Repeated references in the exemption’s legislative history to rules governing health and safety also make clear that Congress intended to exempt occupancy limits and not unrelated-persons rules. The House Report thus refers to the exempted rules as those that “limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit.” H.R. Rep. No. 711, *supra*, at 31. See 133 Cong. Rec.

The court of appeals also recognized that the policy of the FHA would be frustrated by application of the exemption here. Pet. App. 21a-26a. In extending the protections of the FHA in 1988 to persons with handicaps, Congress acknowledged the special need of such persons for group homes and other “congregate living arrangements.” H.R. Rep. No. 711, *supra*, at 23-24. Congress sought to prevent municipal “zoning decisions and practices” from excluding persons with handicaps from suitable housing. *Id.* at 24. As the House Report explained, localities had often “restrict[ed] the ability of individuals with handicaps to live in communities” by imposing zoning requirements that either explicitly or in effect excluded such persons. *Ibid.* The court of appeals correctly concluded that because the Amendments were intended “to protect the right of handicapped persons to live in the residence of their choice in the community[,] * * * [e]xempting Edmonds’ ordinance as an occupancy restriction would undermine the purposes of the FHAA * * * [and] insulate these single-family residential zones from [its] sweep.” Pet. App. 24a-25a.

Petitioner suggests (Pet. 18) that because this Court, as a constitutional matter, has “affirmed a community’s ability to limit the number of unrelated adults who may occupy a residence in the single family zone and struck down attempts to regulate by similar definitions

3755 (1987) (remarks of Sen. Metzenbaum explaining that “the bill does not prevent governments from imposing safety and health related limitations on the number of persons who may occupy a housing unit”); 134 Cong. Rec. 15,857 (1988) (remarks of Rep. Morella explaining that “[t]his bill respects State and local ordinances regarding the number of occupants per unit and other safety standards”).

extended familial relationships," zoning rules treating unrelated persons differently from families cannot violate the FHA. See Pet. 24 (referring to unrelated-persons rules as establishing "a distinction based on the line of Supreme Court decisions regarding single family zoning"). The court of appeals properly rejected that argument. Pet. App. 26a-29a (distinguishing *Elliott v. City of Athens*, *supra*). The fact that zoning rules that treat families differently from unrelated persons may be constitutional does not establish that they are the type of rules exempted from the requirements of the FHA. The court of appeals recognized that the question here "is not whether Edmonds' ordinance could withstand a constitutional challenge," but "whether Congress intended to apply the substantive standards of the FHAA to the ordinance." Pet. App. 28a. Reasonable accommodation under the FHA "can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances." *Id.* at 29a.¹¹

¹¹ Petitioner suggests, as did the district court, see Pet. App. 11b-12b, that this Court has held that occupancy limits that apply to all residents and seek to prevent overcrowding are unconstitutional. Petitioner is incorrect. Such restrictions, based on health and safety concerns, may be applied to families as well as to unrelated persons. See Pet. App. 27a n.6, citing *Moore v. City of East Cleveland*, 431 U.S. 494, 500 n.7 (1977) (opinion of Powell, J.), and *id.* at 520 n.16 (Stevens, J., concurring in the judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

DAVID K. FLYNN
REBECCA K. TROTH
Attorneys

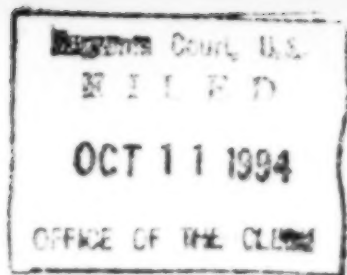
SEPTEMBER 1994

16
CASE NO: 94-23

IN THE

Supreme Court of the United States

TERM: OCTOBER 1994



CITY OF EDMONDS

Petitioner

v.

Washington State Building Code
Council, et al.,

Respondents

and

United States of America

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT
OF APPEALS FOR NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

W. Scott Snyder*
OGDEN MURPHY WALLACE
2100 Westlake Center Tower
1601 5th Avenue
Seattle, WA 98101
(206) 447-7000
*Counsel of Record

aBCD Legal Printers, Seattle, Washington

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QUESTION PRESENTED FOR REVIEW

Does the traditional zoning definition of a "single family," established to limit the use and occupancy of residences in single family residential zones, constitute a "reasonable occupancy limitation" pursuant to the exemption created by the Fair Housing Act Amendments, 42 U.S.C. §3607(b)(1), when neutral on its face and applied without any evidence of an intent to discriminate against persons protected by the Fair Housing Act and Fair Housing Act Amendments, 42 U.S.C §§3601 - 3631?

PARTIES TO THE PROCEEDING

City of Edmonds, Washington
 United States of America
 Oxford House-Edmonds
 Oxford House, Inc.
 Herb Hamilton
Parties Dismissed¹

¹The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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MISCELLANEOUS

H.R. Rep. No. 711, 100th Cong.,
2nd Sess. at 23, reprinted in
1988 U.S.C.C.A.N. 2173 3

Respondents Oxford House and the United States in their Briefs in Opposition to the City of Edmonds' Petition for Writ of Certiorari assert that 1993 enactments by the Washington State Legislature render the issues in this appeal moot. This Reply Brief is offered on two issues:

1. The meaning and effect of the action of the Washington State Legislature is unclear, has not been judicially interpreted, is currently not the subject of litigation and would benefit from clarification of the Fair Housing Act Amendments and its exemption of state, local and federal occupancy limitations.

2. The issues are not moot due to the action maintained against the City by the United States for damages under the Fair Housing Act Amendments for acts

allegedly committed well prior to the enactment of the state provisions.

ISSUE NO. 1

In 1993 the Washington State Legislature amended the Washington Discrimination Act to incorporate the Fair Housing Act and Fair Housing Act Amendments. 1993 Washington Session Laws, Chapter 69. The legislature also enacted during the same legislative session the provision referenced in the briefs of Oxford House and the United States. 1994 Washington Session Laws, Chapter 273, §§ 14 and 16. No Washington appellate case has considered the impact of RCW 35A.63.240 nor is Petitioner aware of an action pending in any Washington court relating to interpretation of the provisions.

RCW 35A.63.240 states:

No city may enact or maintain any ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, "handicaps" are as defined in the Fair Housing Amendments Act of 1988 (U.S.C. § 3602).

This paragraph unartfully attempts to incorporate comments of Congress contained in the legislative record regarding enactment of the Fair Housing Act Amendments and particularly 42 U.S.C. §3607(b)(1). H.R. Rep. No. 711, 100th Cong., 2nd Sess. at 23, reprinted in 1988 U.S.C.C.A.N. 2173. The reference in the state statute to residential structures confuses rather than clarifies the intent

of the state legislature. There is no state legislative history on the meaning or intent of the action.

As the second issue of this Reply Brief notes, an action for damages by the federal government prevents any allegation of mootness. Similarly, the intent and impact of the Washington state provision is far from clear. Clarification by the Supreme Court of the obligations of the parties under the Fair Housing Act would benefit resolution of the state issue. The incorporation of state statutes parallel to the Fair Housing Act and Fair Housing Act Amendments and the contemporaneous enactment of RCW 35A.63.240 clearly indicates an intent by the state of Washington to incorporate the Fair Housing Act and Fair Housing Act amendments. What the obligations of a

municipality is under state statute will necessarily parallel its federal obligation under the Fair Housing Act Amendments. Therefore, clarification of this issue would not only solve a national purpose by resolving a conflict between the circuits but also provide guidance to the state courts in interpreting and applying the state enactments.

ISSUE NO. 2

Irrespective of any potential application of the recent amendment of statute relative to a City's zoning powers, Washington Revised Code Section 35A.63.240 RCW, and its prospective impact on the validity of Edmonds' zoning ordinance, issues exist as to whether a violation of the Federal Fair Housing Act Amendments has occurred as claimed by the Federal Government in its complaint

against the City of Edmonds. When one of several issues becomes moot, the remaining live issues satisfy the case or controversy requirement of Article III. Powell v. McCormack, 395 U.S. 486, 23 L.Ed.2d 491, 502, 89 S.Ct. 1944 (1969). Consequently, the Federal Government's claim precludes a finding of mootness.

This appeal arose after consolidation of two, separate underlying actions: (1) a declaratory judgment action initiated by the City of Edmonds, and (2) an action for violation of the FHAA brought by the Federal Government against the City of Edmonds. The Federal Government filed its complaint in 1991 requesting damages and civil penalties under 42 U.S.C. § 3614(d)(1)(B) & (C) as well as declaratory and injunctive relief for alleged FHAA violations. Enactment of RCW 35A.63.240

did not occur until 1993. Even assuming arguendo that Washington's zoning amendment renders the City of Edmonds' declaratory judgment action moot, issues remain regarding the validity of the Federal Government's claim for alleged Fair Housing Act Amendment violations. The continued potential for the assessment of damages and penalties against the City of Edmonds establishes a concrete interest of the parties in a final resolution of whether ECDC constitutes a reasonable occupancy limitation exempt from the Fair Housing Act Amendment requirements. So long as a claim for damages and penalties exist, the parties have an interest in the outcome of the litigation which precludes a finding of mootness. See, e.g., Memphis Light, Gas & Water Division v. Craft, 436 U.S. 1, 56 L.Ed.2d 30, 98 S.Ct. 1554

(1978); Ellis v. Brotherhood of Ry.,
Airline and S.S. Clerks, Freight Handlers,
Exp and Station Employees, 466 U.S. 435,
80 L.Ed.2d 428, 104 S.Ct. 1883 (1984).

Respectfully submitted.

W. Scott Snyder

October 1994

(4)

No. 94-23

In the
Supreme Court of the United States
October Term, 1994

CITY OF EDMONDS,
Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,
et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**MOTION FOR LEAVE TO FILE BRIEF AMICUS
CURIAE AND BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

RONALD A. ZUMBRUN
*ANTHONY T. CASO
ALAN W. FOUTZ
GREGORY W. MCCracken
*Counsel of Record
Pacific Legal Foundation
2151 River Plaza Drive, Suite 305
Sacramento, California 95833
Telephone: (916) 641-8888
*Attorneys for Amicus Curiae,
Pacific Legal Foundation*

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**MOTION FOR LEAVE TO FILE
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PACIFIC LEGAL FOUNDATION IN SUPPORT
OF THE PETITION FOR WRIT OF CERTIORARI**

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully moves this Court for leave to file the attached amicus curiae brief in support of the petition for writ of certiorari. Written consent to the filing of this brief has been granted by counsel for petitioner and by counsel for respondent United States. Said letters of consent have been lodged with the Clerk of this Court. Counsel for respondents Washington State Building Code Council and

Oxford House, Inc., have withheld consent, necessitating the filing of this motion.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, the majority of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the argument in the petition for writ of certiorari. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional and statutory issues presented. PLF has participated in numerous cases involving local zoning and land use regulations: *Dolan v. City of Tigard*, 512 U.S. ___, 62 U.S.L.W. 4576 (Jan. 21, 1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); cases that address the possible discriminatory effect of local ordinances, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); and cases that address the balance between federal and local regulatory power, *Agins v. City of Tiburon*, 447 U.S. 255 (1980), *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991).

The opinion below holds that a local zoning ordinance that limits the number of nonfamily members who may reside in a dwelling zoned single-family residential is subject to the antidiscrimination provisions of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (FHA or the Act), and the Fair Housing Act Amendments (FHAA) of 1988. This result was reached despite the Edmonds' ordinance's qualification for exemption from FHAA mandates found at 42 U.S.C. § 3607(b)(1), which state that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." This ruling is in direct contrast with an Eleventh Circuit ruling that held an almost identical zoning ordinance was exempt from this section of the FHAA. *See Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir. 1992).

More troubling is the fact that the Ninth Circuit's decision significantly undermines local government's ability to enact land use regulations and represents an unwarranted and dangerous incursion of federal power into local governmental affairs. To the extent that land use and occupancy restrictions may be imposed by governmentally wielded police power, they ought to originate and be interpreted at the local level. This Court has long recognized that land use regulations and property law have traditionally been the province of state authority. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

By basing its ruling on the ordinance's failure to limit the number of family members as well as nonfamily members that can live together (*City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802, 807 (9th Cir. 1994)), the Court of Appeals in the instant case has stretched the bounds of statutory construction to the point of

absurdity in order to remove Edmonds' zoning ordinance from FHAA exemption. This placed Edmonds, and all other cities that have enacted similar ordinances, in the untenable position of having to redraft their maximum occupancy ordinances to limit the number of inhabitants to a specified ratio of persons per square foot of habitable floor area in a dwelling, without any reference to whether the inhabitants are related or not. Language referring to relatedness will remove an ordinance from the FHAA exemption, and a simple ceiling on the number of inhabitants in a dwelling may run afoul of the Due Process Clause of the Fourteenth Amendment. The remaining available scheme, if implemented, could substantially prejudice the City of Edmonds' efforts to accommodate the housing needs of large single families.

The alternative is to relinquish a large measure of local control over this quintessentially local determination to federal oversight. In short, the court below has unnecessarily intruded upon the local government's ability to establish reasonable occupancy limitations while yet preserving the ability of large families to live together.

For the foregoing reasons, Pacific Legal Foundation requests that its motion to file the amicus curiae brief which follows be granted.

DATED: August __, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN
 *ANTHONY T. CASO
 ALAN W. FOUTZ
 GREGORY W. MCCrackEN
 *Counsel of Record
 Pacific Legal Foundation
 2151 River Plaza Drive,
 Suite 305
 Sacramento, California 95833
 Telephone: (916) 641-8888

By _____
 ANTHONY T. CASO
*Attorneys for Amicus Curiae,
 Pacific Legal Foundation*

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MISCELLANEOUS

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No. 94-23

In the
Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,
Petitioner,
v.

WASHINGTON STATE BUILDING CODE COUNCIL,
et al.,
Respondents.

Petition for Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT
OF THE PETITION FOR WRIT OF CERTIORARI**

INTERESTS OF AMICUS CURIAE

The interest of amicus curiae is set forth in the
preceding motion and is adopted herein.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994). The Ninth Circuit has created a clear and unavoidable split among Courts of Appeals with regard to the type of local zoning ordinances that are subject to the mandates of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (FHA or the Act), and the Fair Housing Act Amendments of 1988 (FHAA), which extended the Act's antidiscrimination provisions to the handicapped. 42 U.S.C. §§ 3604(f)(2), 3604(f)(3)(B), 3607(b)(1).

The court below ruled that a local zoning ordinance that limits the number of nonfamily members who may reside in a dwelling zoned single-family residential is subject to FHAA's antidiscrimination provisions, notwithstanding the unambiguous exemption found at 42 U.S.C. § 3607(b)(1), which states that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

This ruling is in direct contrast with an Eleventh Circuit ruling that held an almost identical zoning ordinance was exempt from this section of the FHAA. See *Elliott v. Athens*, 960 F.2d 975, 979-81 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 287 (1992). Expressly disagreeing with the Eleventh Circuit (*Edmonds*, 18 F.3d at 806), the Ninth Circuit has construed the FHAA exemption to include only those zoning ordinances that restrict "all occupants, whether related or not." *Id.* at 807.

STATEMENT OF THE CASE

Oxford House, Inc., sponsors halfway houses around the country for recovering alcoholics and drug addicts. Each house must have six or more residents in order to ensure financial self-sufficiency. The Oxford House in Edmonds, Washington, is a leased residence for 10 to 12 adult men. The house is situated in an area that is zoned single-family residential.

Edmonds issued criminal citations to the owner of the Oxford House for violating provisions of the Edmonds Community Development Code (ECDC) which provide that property zoned single-family residential may only be used for single-family dwelling units. ECDC § 16.20.010(A)(1). A single-family dwelling unit means a detached building used by one family, limited to one per lot. ECDC § 21.90.080. Under ECDC § 21.30.010, a family "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." Thus, group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in Edmonds.

Under the FHAA, it is unlawful to discriminate against any person because of a handicap. 42 U.S.C. § 3604(f)(2). The residents of the Oxford House are handicapped persons under the FHAA. 42 U.S.C. § 3602(h) (stating that a person participating in a supervised drug rehabilitation program, coupled with nonuse, meets the definition of handicapped). Where FHAA's provisions apply, a finding of discrimination may be based on "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person

equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Whether the City of Edmonds complied with the substantive requirements of the FHAA is not presently at issue.

However, certain regulations are exempt from FHAA's provisions. Under 42 U.S.C. § 3607(b)(1), FHAA's provisions do not apply to "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The parties to this case have stipulated to the fact that the zoning ordinance here at issue was not enacted out of any animus toward or intent to discriminate against the occupants of Oxford House because of their handicap.

Oxford House requested the City of Edmonds to make reasonable accommodations under Section 3604(f)(3)(B) by letting it continue operations in the single-family residential zone. The City of Edmonds declined and filed a declaratory relief action seeking a ruling that its single-family residential zoning provision was exempt from FHAA's provisions under Section 3607(b)(1).

The District Court held that the exemption applied, relying on the analysis provided in *Elliott v. Athens*, 960 F.2d 975, an Eleventh Circuit decision that likewise involved an attempt to establish a group recovery home in a dwelling zoned single-family residential. However, the Ninth Circuit disagreed with the *Elliott* court's analysis and held that the exemption did not apply and that the zoning ordinance was in violation of the FHAA. The Ninth Circuit's decision therefore creates a direct and irreconcilable split among circuits with regard to how FHAA's exemptions are to be interpreted.

REASONS FOR GRANTING THE WRIT

Supreme Court Rule 10.1(a) lists among the considerations governing review on certiorari the circumstance when a United States Court of Appeals has rendered a decision in conflict with the decision of another United States Court of Appeals on the same matter. Supreme Court Rule 10.1(c) lists the circumstance when a United States Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. Both of these grounds for review are present in this case.

I

THIS COURT SHOULD SETTLE THE SCOPE OF THE FHAA EXEMPTION'S APPLICABILITY TO SINGLE-FAMILY ZONING SCHEMES

A. The City of Edmonds' Single-Family Zoning Ordinance, Whose Structure Is Typical of Many Local Zoning Schemes, Is Exempt from the FHAA by the FHAA's Clear Language

1. The Ordinance Restricts the Maximum Number of Individuals Permitted To Occupy a Dwelling

The FHAA exempts some regulations from its purview, including reasonable local restrictions on the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607(b)(1). The City of Edmonds permits five or fewer unrelated persons or two or more persons related as

specified by ordinance to live in a single-family dwelling within its boundaries. ECDC § 21.30.010. The structure of the City's zoning code is common to the vast majority of cities in the State of Washington and many communities throughout the country. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802. Although Edmonds' ordinance makes a distinction on the basis of the relatedness of the occupants of a single-family dwelling, the ordinance nevertheless restricts the maximum number of occupants who may occupy a dwelling and is therefore exempt from the FHAA according to the FHAA's plain language.

The distinction based on relatedness exists only to recognize the protection that the Due Process Clause of the Fourteenth Amendment extends to the family. The definition of relatedness in Edmonds' ordinance follows the form which this Court approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The ordinance expressly avoids limiting the number of members of a family in light of this Court's teaching in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), which prohibits municipalities from forcing people to live in certain narrowly defined family patterns. The ordinance's constitutionally necessary accommodation of familial interests does not render its remaining language any less of a restriction on the maximum occupancy of a single-family dwelling.

2. The Ordinance Is Reasonable

The ordinance is a reasonable restriction on the maximum number of occupants who may occupy a dwelling. The City of Edmonds has an unquestionably legitimate interest in the tranquility of its single-family residential areas, see *City of Memphis v. Greene*, 451 U.S. 100, 127 (1981), and it may exercise its police powers "to lay out

zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.'" *Id.* at 790 n.43 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 9). The ordinance controls population density, traffic, and noise in single-family residential areas while preserving the residential character of such areas. The ordinance also affects a category of people identified by their desire to live as a large group in a single-family residence. As applied in this case, the ordinance precludes unrelated groups of more than five recovering alcoholics and drug abusers from living in a single-family residential dwelling. The ordinance's burden on recovering alcoholics and drug abusers is not onerous and leaves them with alternatives: like all unrelated persons, they may live in groups of more than five in areas of Edmonds zoned for higher density residential habitation, or they may live in groups of five or less in single-family areas. In view of Edmonds' long-standing and legitimate interest in maintaining the character of single-family areas, the ordinance is reasonable, and as a restriction on the maximum number of people who may inhabit a dwelling, it is exempt from the FHAA.

B. The Ninth Circuit's Misinterpretation of the FHAA Exemption Extends the FHAA's Reach Beyond What Congress Intended

As concerns local land use laws, regulations, practices, and decisions, Congress intended the FHAA to prohibit discrimination against the handicapped in several manners in which it has traditionally occurred. H.R. REP. NO. 711, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2184-85 (H.R. REP. NO. 711). The first means of discriminatory treatment specifically prohibited is "the enactment or imposition of ... land-use requirements on congregate living arrangements among non-related persons with disabilities." *Id.* at 2185. The second

means is "the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of [handicapped] individuals to live in the residence of their choice in the community." *Id.* The third means is "the application or enforcement of otherwise neutral rules and regulations on ... land-use in a manner which discriminates against people with disabilities." *Id.* (footnote omitted).

Although the City of Edmonds' zoning ordinance is exempt from these requirements as discussed above, assuming *arguendo* that it is not, the ordinance still does not discriminate against people with disabilities in violation of the FHAA. On its face, the ordinance does not impose special requirements on disabled persons or on groups of disabled persons. In the application of the ordinance to Oxford House, any discrimination against disabled persons occurs not because of their disabilities as such, but rather because of their choice as unrelated persons to live as a group of more than five in a single-family residential area. Such treatment is not discrimination at all, for in this situation, the disabled are treated in precisely the same manner as any other unrelated persons, and this treatment does not result from "false or over-protective assumptions about the needs of handicapped people, [or from] unfounded fears of difficulties about the problems" that their presence would pose. *Id.* Indeed, there are no allegations that the City of Edmonds acted out of any animus against the occupants of Oxford House on the basis of their disability. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d at 803.

C. The Ninth Circuit's Ruling Violates Congressional Intent To Avoid Federal Interference in Fundamental Local Land Use Decisions

The decision below held that the City of Edmonds' zoning ordinance is not exempt from the FHAA and must therefore meet the FHAA's requirements. The decision employed language which belittled the efforts of Edmonds and other cities to meet the requirements of the Due Process Clause in facially neutral zoning ordinances. Two consequences necessarily follow the Ninth Circuit's interpretation of the FHAA exemption.

Any city which wishes to avail itself of the exemption must amend its occupancy restrictions so that they are expressed in terms of a number of inhabitants per unit of habitable floor area in a dwelling. Any attempt to accommodate large single families will subject the zoning scheme to federal requirements.

Congress intended the FHAA to prohibit discrimination on the basis of handicap. H.R. REP. NO. 711 at 2184. Because this Court has recognized that the power of local governments to zone and control land use is broad, *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981), and that zoning laws are peculiarly within the province of state and local legislative authorities, *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975), the Ninth Circuit's interpretation of the FHAA is more invasive of the province of local government than is warranted to accomplish Congress' intent. Congress cannot have intended to require numerous cities to either rewrite their zoning ordinances or be subject to federal control on basic land use decisions because it included a straightforward exemption for such decisions in the FHAA.

**D. The Ninth Circuit's Ruling Requires
Discriminatory Treatment of the Disabled
Rather than the Nondiscrimination
Intended by the FHAA Exemption**

As a result of the Ninth Circuit's decision, disabled persons who wish to live as a group in a single-family residential area will receive preferential treatment with respect to local maximum occupancy ordinances that is unwarranted by Congress' admittedly legitimate desire to prevent discrimination based on handicap. A city will have to honor the wishes of group homes such as Oxford House in accordance with federal law, notwithstanding the availability of multiple-family residential areas and in spite of the inability of nondisabled persons to live as groups in single-family areas or face litigation over the reasonableness of the accommodations made in applicable rules or policies.

As discussed above, the disabled are not experiencing discrimination because of their disabilities, but rather because of their desire to live in a high density arrangement in a low density neighborhood. Edmonds' ordinance treats all unrelated groups evenhandedly, and the FHAA will protect the disabled from any discrimination they may encounter when they choose to live in smaller groups in low density neighborhoods. In short, the Ninth Circuit's interpretation below of the FHAA exceeds the nondiscriminatory treatment of the disabled which Congress intended.

II

**DECISIONS BY SOME UNITED STATES
COURTS OF APPEALS CONFLICT ON THE
QUESTION OF WHETHER THE FHAA
EXEMPTS TRADITIONAL AND
PREVALENT SINGLE-FAMILY ZONING
SCHEMES FROM ITS COVERAGE**

Some United States Courts of Appeals have rendered conflicting decisions on the question of whether 42 U.S.C. § 3607(b)(1) exempts a group of similar single-family zoning ordinances. The Eleventh Circuit, in its decision in *Elliott v. City of Athens*, 960 F.2d at 984, found traditional single-family zoning to be a type of occupancy restriction exempt from FHAA coverage. The Eighth Circuit affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes, despite a resulting restriction on the housing choices of the disabled. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). *See also Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989) (applying similar reasoning to uphold a zoning ordinance limiting the residency of unrelated adults when applied to a shelter for battered women). The decision of the Ninth Circuit in this case explicitly rejects the reasoning of the Eleventh Circuit, and it also conflicts with the position of the Eighth Circuit of the United States Court of Appeals as well.

CONCLUSION

By ruling that the FHAA exemption for reasonable maximum occupancy restrictions does not apply to the City of Edmond's zoning ordinance, the Ninth Circuit misinterprets Congress' intent behind the exemption. It thereby leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions. Moreover, the Ninth Circuit grants a preference to the disabled that permits them to live as large groups in single-family residential neighborhoods, which is a right that no other unrelated group of people enjoys. The Ninth Circuit's decision also conflicts with an Eleventh Circuit decision on a virtually identical zoning ordinance, and it is inconsistent with a decision in the Eighth Circuit.

To resolve this conflict and to give effect to the FHAA exemption as Congress intended, Pacific Legal Foundation respectfully submits that this Court should grant the petition for writ of certiorari.

DATED: August, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN

*ANTHONY T. CASO

ALAN W. FOUTZ

GREGORY W. MCCracken

*Counsel of Record

Pacific Legal Foundation

2151 River Plaza Drive, Suite 305

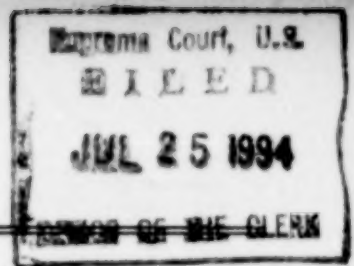
Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amicus Curiae,

Pacific Legal Foundation

(2)
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BRIEF OF TOWNSHIP OF UPPER ST. CLAIR AS
AMICUS CURIAE IN SUPPORT OF PETITION

Counsel to Amicus Curiae

ROBERT N. HACKETT*

MARK J. CHRISTMAN

ROBERT N. HACKETT & ASSOCIATES

1105 Boyce Road

Pittsburgh, PA 15241

(412) 941-3331

* Counsel of Record

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BRIEF OF TOWNSHIP OF UPPER ST. CLAIR AS
AMICUS CURIAE IN SUPPORT OF PETITION

INTEREST OF AMICUS CURIAE

Amicus curiae respectfully submits the within brief in support of the petition for a writ of certiorari. The Township of Upper St. Clair ("Township") is a political subdivision of the Commonwealth of Pennsylvania. Counsel to Amicus curiae is the authorized law officer of the Township. Therefore, consent to the filing of this brief is not necessary. Supreme Court Rule 37.5.

The Township is concerned because the Township, like thousands of political subdivisions across the country, utilizes single family zoning as the basic building block for its zoning scheme. In drafting its definition of family, the Township believed that its definition was within the exemption to the Fair Housing Act Amendments set forth at 42 U.S.C. § 3607(b)(1) for reasonable occupancy limitations. The decision by the Court of Appeals for the Eleventh Circuit in *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir. 1992), *cert. denied*, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct. 19, 1992) confirmed this understanding. The decision by the Court of Appeals for the Ninth Circuit has left the Township with no idea whether its zoning ordinance violates the Fair Housing Act Amendments, 42 U.S.C. §§ 3601-3631.

The concern of Amicus curiae is a very realistic and immediate one. On August 31, 1993, Southwinds, Inc. ("Southwinds"), Residential Resources, Inc. ("Residential Resources") and three mentally retarded persons filed a Complaint against Township in the United States District Court, Western District of Pennsylvania, at Civil Action No. 93-1443. *Cox et al. v. Township of Upper St. Clair*, C.A. No. 93-1443 (E.D.Pa. May 18, 1994). Southwinds is a not-for-profit corporation which operates community residential programs for persons with mental retardation and is the residential service provider for the three mentally retarded persons. Residential Resources is a not-for-profit corporation which purchases properties to be used by persons with disabilities.

In their Complaint, plaintiffs alleged that the Township's Zoning Ordinance violates the Fair Housing Act

and Fair Housing Act Amendments, 42 U.S.C. § 3601-3631.

On November 15, 1993, the Township filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). The United States of America filed a brief as Amicus curiae in support of the plaintiffs.

By Memorandum Opinion and Order dated May 18, 1994, Judge Maurice B. Cohill, Jr. of the United States District Court, Western District of Pennsylvania, denied the Township's Motion to Dismiss with respect to the claims under the Fair Housing Act Amendments. (See Memorandum Opinion and Order dated May 18, 1994, attached as Appendix A.)

The case concerns the enforcement and propriety of a zoning ordinance enacted by the Township. (The Factual Statements in this Brief are from the Memorandum Opinion and Order.) For zoning purposes, the Township is divided into five residential zones, delineated R-1, R-2, R-3, R-4, and R-5. The three mentally retarded persons reside in an R-2 Zoning district. Township Code Section 130.9 defines those uses permitted in the R-2 Single-Family Residential District and limits permitted principal uses by right to Single-Family Dwellings. The Township Code defines single family dwelling in Section 130.3.80 as "A RESIDENTIAL DWELLING containing one (1) DWELLING UNIT occupied by one FAMILY and which is the only PRINCIPAL BUILDING on the LOT." On July 30, 1993, the Township issued a notice of violation to Residential Resources and Southwinds. The notice of violation charged Residential Resources and Southwinds with

violating Township Code Section 130.3.84. The Township Zoning Code in Section 130.3.84 defines "FAMILY" as,

one (1) or more persons related by blood, marriage or adoption; or a group of not more than two (2) persons who need not be related by blood, marriage or adoption, who are living together in a DWELLING UNIT and maintaining a common household and practicing on a permanent basis a joint economic, social and cultural life. If two (2) persons are living together unrelated by blood, marriage or adoption, the basis for the relationship cannot be therapeutic or corrective or the profit motive. In addition, temporary gratuitous guests or persons, such as domestic servants, employed by the FAMILY and who report to the FAMILY for supervision and decision making may reside with the FAMILY. FAMILY shall not be construed to include a PERSONAL CARE HOME, a GROUP HOME, or a GROUP LIVING ARRANGEMENT. Nothing in this definition shall be construed to prohibit providing a home for children under the age of eighteen (18) years who are foster children or are living with the FAMILY with the permission of their parent or legal guardian.

Plaintiffs alleged that the Township Zoning Code violates the Fair Housing Act Amendments in that the Code discriminates against the three mentally retarded persons by, inter alia, prohibiting them from living in residential zones R-1 and R-2 and failing to provide them with reasonable accommodations, even though the Zoning Code does not distinguish between disabled and non-disabled unrelated persons. In its Motion to Dismiss, the Township argued that the Township's definition of family

is within the exemption set forth at 42 U.S.C. § 3607(b)(1) for the reasonable occupancy limitations of local government entities. Pursuant to this section of the Fair Housing Act Amendments, the Township urged that its Code is merely a "reasonable . . . restriction[]" regarding the maximum number of occupants permitted to occupy a dwelling." In support, the Township extensively relied on *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir. 1992), cert. denied, 113 S.Ct. 376, 121 L.Ed.2d 287, 61 U.S.L.W. 3155 (U.S., Oct. 19, 1992), wherein the United States Court of Appeals for the Eleventh Circuit considered a reasonable restriction exemption similar to the one proposed by the Township.

In his Memorandum Opinion, United States District Judge Maurice B. Cohill, Jr., in holding that the plaintiffs have stated a claim under the Fair Housing Act Amendments upon which relief can be granted and denying the Township's Motion to Dismiss the Fair Housing Act claim, stated:

Elliott has been consistently criticized, see e.g., *Oxford House-C v. City of St. Louis*, 843 F.Supp. 1556, 1574 (E.D. Mo. 1994) (collecting cases), and we will not repeat those criticisms here, except to state that we too disagree with *Elliott*.

The conflicting decisions in *Elliott v. City of Athens, Ga.*, 960 F.2d 975 (11th Cir. 1992), cert. denied, U.S. 113 S.Ct. 376, 121 L.Ed.2d 287 (1992) and *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802 (9th Cir. 1994) have given the Township a Hobson's choice. The Township now must either abandon its definition of family, despite its belief that *Elliott* was correctly

decided, or risk the very real possibility that it will be found in violation of the Fair Housing Act Amendments.

REASONS FOR GRANTING THE PETITION

Amicus curiae joins with petitioner in urging this Court to review the Ninth Circuit's decision because it is in direct conflict with a decision from the Eleventh Circuit, because the decision represents a major departure from related precedent from this Court, and because the question presented has significant national importance.

I. The Question Presented Affects Thousands Of Municipalities Across The Country That Utilize Single Family Zoning As The Basic Building Block For Their Zoning Schemes.

This is a very important issue. One-family or single-family detached residence districts are a well-recognized fact of use zoning regulations. As David M. Burch and Scott M. Ryals wrote:

The single-family zoning district has become the hallmark of modern American land use control. Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.* [262 U.S. 365 (1926)], literally bristles with disdain for apartments and those who live in them. He likens apartment houses to "mere parasites" that feed upon the light, fresh air, and open spaces of the single-family district. From this exalted position, the single-family zone and its protection have tended to dominate local land use decision-making.

D. Burch and S. Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 Urban Law. 879, 880 (1983).

The right to establish such highly restricted districts has been well settled for years. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The definition of "family" is essential to zoning district regulation. Many local legislatures have redefined the term "family" to exclude groups of unrelated persons from occupying dwellings in districts restricted to single-family use. R. Anderson, *American Law of Zoning*, § 9.30 (1986).

The decision is of critical importance to our nation's local governments because it will drastically interfere with their legislative function. The Ninth Circuit's decision, if not reviewed by this Court, will have a highly detrimental impact on single family zoning. Indeed, the decision may be the demise of single family zoning.

II. The Decision Represents A Major Departure From Related Precedent From This Court And From Other Circuits Supporting The Right To Establish Such Highly Restricted Districts.

This Court has consistently acknowledged a community's lawful ability to regulate the number of unrelated adults who may occupy a residence in a single family zone, so long as groups of unrelated, disabled persons are not treated differently under the law from other groups of unrelated persons. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Moore v. City of East Cleveland, Ohio*, 431 U.S.

494 (1977); *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432 (1985).

This Court resolved the constitutional issues in *Belle Terre v. Boraas*, 416 U.S. 1 (1974). The *Belle Terre* case resulted when six college students rented a house in a single-family neighborhood. The ordinance limited occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons. Mr. Justice Douglas, speaking for a majority of the Court, found no evidence in the record of any infringement of constitutional rights, stating:

It is said however, that if two unmarried people can constitute a "family" there is no reason why three or four may not. But every line drawn by a legislature leaves some out that may well have been included. That exercise of discretion, however, is a legislative not a judicial function . . .

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, *supra*. [348 U.S. 26 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1974).

The Township respectfully submits that the Ninth Circuit's decision in *City of Edmonds* does not accurately set forth the state of the law and is in conflict with the Third Circuit's Opinion in *Doe v. City of Butler*, 892 F.2d

315 (3d Cir. 1989). In *Doe*, the Third Circuit upheld a zoning ordinance limiting the residency of unrelated adults when applied to a shelter for battered women. Under similar analysis, the Eighth Circuit affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes. *Familystyle of St. Paul, Inc. v. City of St. Paul, Minn.*, 728 F.Supp. 1396 (D.Minn. 1990), *affd.* 923 F.2d 91 (8th Cir. 1991).

III. The Court of Appeals' Interpretation Of 42 U.S.C. Section 3607(b)(1) Directly Conflicts With The Eleventh Circuit's Interpretation.

The decisions of the Ninth and Eleventh Circuits are directly contrary to each other.

In *Elliott v. City of Athens, GA*, 960 F.2d 975 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 376, 121 L.Ed.2d 287 (1992), the Eleventh Circuit held that a zoning ordinance permitting a maximum of four unrelated individuals to occupy a single family residence imposed a "maximum occupancy limitation" within the meaning of 42 U.S.C. § 3607(b)(1), although the ordinance placed no limit on the number of family members who could reside together. *Elliott v. City of Athens, GA*, 960 F.2d 975, 979-981 (11th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 376, 121 L.Ed.2d 287 (1992).

The Ninth Circuit reached the contrary conclusion, stating: "Section 3607(b)(1) only exempts occupancy restrictions that apply to all occupants, whether related or not." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 807 (9th Cir. 1994).

The Ninth Circuit noted the conflict, stating, "we disagree with *Elliot*, and so must reverse and remand." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 803 (9th Cir. 1994).

The issue is narrow, and there is a direct conflict on an issue of sufficient national importance to warrant review.

CONCLUSION

For all of the foregoing reasons and for the additional reasons set forth in the petition, the writ of certiorari should be granted.

Respectfully submitted,

ROBERT N. HACKETT

MARK J. CHRISTMAN

ROBERT N. HACKETT & ASSOCIATES
1105 Boyce Road
Pittsburgh, PA 15241
(412) 941-3331

*Counsel to Amicus Curiae,
Township of Upper St. Clair*

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

JONATHAN COX, ANTHONY)	
LEGINE, CHARLES LATIMER, by)	
and through their next friend,	)	Civil Action No.
ROBERT MOCHAN;	)	93-1443
SOUTHWINDS, INC.; and)	
RESIDENTIAL RESOURCES, INC.,)	
Plaintiffs,)	
v.)	
TOWNSHIP OF UPPER ST.)	
CLAIR,)	
Defendant.)	

MEMORANDUM OPINION

COHILL, D.J.

Before the Court is a Motion to Dismiss (Doc. 10) filed by defendant Township of Upper St. Clair, Pennsylvania (Township) in response to a complaint (Doc. 1) filed by the plaintiffs Jonathan Cox, Anthony Legine, Charles Latimer, Southwinds, Incorporated (Southwinds), and Residential Resources, Incorporated (Residential Resources). The Township is a political subdivision of the Commonwealth of Pennsylvania. Compl. ¶ 10. Messrs. Cox, Legine, and Latimer are mentally retarded. *Id.* ¶¶ 4-6. Southwinds is a not-for-profit corporation that operates community residential programs for persons with mental retardation and is the residential service provider for Messrs. Cox, Legine, and Latimer. *Id.* ¶ 8. Residential Resources is a not-for-profit corporation that

purchases properties to be used by persons with disabilities. *Id.* ¶ 9.

In their complaint, plaintiffs allege that the defendant's zoning ordinance violates (1) Title VIII of the Civil Rights Act, 42 U.S.C. § 3601 *et seq.*, Compl. ¶ 56, (the Fair Housing Act or FHA claim); (2) the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution and 42 U.S.C. § 1983, Compl. ¶¶ 57, 58 (the Equal Protection and Due Process claims); (3) section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, Compl. ¶ 59) the Rehabilitation Act claim); and (4) Title II of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12131, Compl. ¶ 60 (the ADA claim).

For the reasons below, we will deny the defendant's motion to dismiss with respect to the claims under the FHA and the Equal Protection and Due Process Clauses and 42 U.S.C. § 1983. We will grant defendant's motion with respect to the claims under the Rehabilitation Act and the ADA.

I. Background

This case concerns the enforcement and propriety of a zoning ordinance enacted by defendant Township. For zoning purposes, the Township is divided into five residential zones, delineated R-1, R-2, R-3, R-4, and R-5. Messrs. Cox, Legine, and Latimer reside at 224 Keifer Drive in Upper St. Clair, which is in R-2. On July 30, 1993, the Township issued a notice of zoning violation against plaintiffs Residential Resources and Southwinds. The Township charged the plaintiffs with violating the Township Code, ch. 130, § 130.3.84. Because the language of the

code is important to the litigation, we set it out in some detail. In § 130.3.84, "family" is defined as

One (1) or more persons related by blood, marriage or adoption; or a group of not more than two (2) persons who need not be related by blood, marriage or adoption, who are living together in a DWELLING UNIT and maintaining a common household and practicing on a permanent basis a joint economic, social and cultural life. If two (2) persons are living together unrelated by blood, marriage or adoption, the basis for the relationship cannot be therapeutic or corrective or the profit motive. In addition, temporary gratuitous guests or persons, such as domestic servants, employed by the FAMILY and who report to the FAMILY for supervision and decision making may reside with the FAMILY. FAMILY shall not be construed to include a PERSONAL CARE HOME, a GROUP HOME, or a GROUP LIVING ARRANGEMENT. Nothing in this definition shall be construed to prohibit providing a home for children under the age of eighteen (18) years who are foster children or are living with the FAMILY with the permission of their parent or legal guardian.

Compl. ¶ 33. And the term "group living arrangements" is defined in the Township code as

Two or more but not more than seven (7) persons . . . who need not be related by blood, marriage or adoption who maintain a common household and practice on a permanent basis a joint economic, social and cultural life, provided that the basis of the relationship is not the profit motive or corrective. A GROUP LIVING

ARRANGEMENT shall not be construed to include any INSTITUTIONAL USE. A GROUP LIVING ARRANGEMENT may include a community living arrangement for mentally retarded or physically handicapped persons.

Id. ¶ 36. Plaintiffs assert that the code as written, and as applied, discriminates against the mentally retarded and is therefore invalid under numerous theories, as discussed below.

II. The Fair Housing Act

The Fair Housing Act (FHA), as the name implies, prohibits discrimination in the sale or rental of housing. Specifically, the FHA provides that

it shall be unlawful . . . [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap. . . .

42 U.S.C. § 3604(f)(1). Plaintiffs allege that the Township code violates the FHA in that the code discriminates against Messrs. Cox, Legime, and Latimer by, *inter alia*, prohibiting them from living in residential zones R-1 and R-2 and failing to provide them with reasonable accommodations. In its motion to dismiss, the Township argues that its code is "exempt" from the FHA, which provides:

Nothing in this subchapter limits the applicability of any reasonable local, state, or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. § 3607(b)(1). Pursuant to this section of the FHA, the Township urges that its code is merely a "reasonable . . . restriction[]" regarding the maximum number of occupants permitted to occupy a dwelling."

In support, the Township extensively relies on *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, ___ U.S. ___, 113 S.Ct. 376 (1992), wherein the United States Court of Appeals for the Eleventh Circuit considered a reasonable restriction exemption similar to the one proposed by the Township. *Elliott* has been consistently criticized, *see, e.g., Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1574 (E.D. Mo. 1994) (collecting cases), and we will not repeat those criticisms here, except to state that we too disagree with *Elliott*.

In sum, the plaintiffs have stated a claim under the FHA upon which relief can be granted. We will therefore deny the defendant's motion to dismiss the FHA claim.

III. The Equal Protection and Due Process Clauses

The plaintiffs have likewise stated claims under the Equal Protection and Due Process Clauses, and 42 U.S.C. § 1983, sufficient to survive defendant's motion to dismiss, which is denied with respect to those claims. *See, e.g., Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 683 (3d Cir. 1991) (noting that a substantive due process challenge to zoning decisions requires factual determinations on issues such as bias, improper motive, and unlawful animus), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1668 (1992).

IV. The Rehabilitation Act

The Rehabilitation Act provides that no handicapped individual, such as those with mental retardation, "shall, solely by reason of his or her disability, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any *program or activity* receiving Federal financial assistance." 29 U.S.C. § 794(a) (emphasis added).

The Township contends that its zoning operations do not constitute a "program or activity" and that the Rehabilitation Act therefore does not apply. The plaintiffs, citing another section of the statute, respond that "program or activity" means "all of the operations" of "a department, agency, special purpose district, or other instrumentality of a State or local government." 29 U.S.C. § 794(b)(1)(A). According to the plaintiffs, a town zoning code is included in "all of the operations" of a local government.

If viewed in isolation, the plaintiffs' definition of "program or activity" might seem plausible. But we look to the context where the words appear. Words in a statute are given their common meaning, and a statute is interpreted, in the first instance, by its words and their context. We find that the plain meaning of § 794(a) does not support the interpretation urged by the plaintiffs. As is made clear by the context in which "program or activity" appears, these words refer to discrete, unique initiatives undertaken by an entity receiving federal funds. Enactment and enforcement of a zoning code are neither programs nor activities as contemplated by the

Rehabilitation Act; rather, they are fundamental undertakings of government. We are unwilling to stretch the definition of "program or activity" beyond that permitted by common sense or common understanding.

We will therefore grant defendant's motion to dismiss with respect to the plaintiffs' Rehabilitation Act claim.

V. The Americans with Disabilities Act

The disputed language in the Americans with Disabilities Act (ADA) is similar to that disputed in the Rehabilitation Act, with one exception: the ADA provides that no disabled individual shall "be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, *or be subjected to discrimination by any such entity.*" 42 U.S.C. § 12132 (emphasis added). The Township argues that the ADA does not apply to its zoning operations because such operations are not "services, programs, or activities." The plaintiffs respond that even if zoning is not a service, program, or activity, they are being "subjected to discrimination" by the Township's zoning.

We again look to the context in which the "subjected to" language appears. The words immediately preceding "subjected to" refer to affirmative acts by a public entity in providing services, programs, or activities. We can only conclude that the ADA prohibits discrimination by public entities in how those entities administer their services, programs, or activities. As discussed above in Part IV, we find that zoning is not a service, program, or activity as contemplated by the ADA. *Accord Moyer v.*

Lower Oxford Township, No. 92-3348, 1993 U.S. Dist. LEXIS 144, at *4-*5 (E.D. Pa. Jan. 6, 1993); *Burnham v. City of Rohnert Park*, No. C 92-1439SC, 1992 U.S. Dist. LEXIS 8540, at *10 n.9 (N.D. Cal. May 18, 1992).

With some trepidation, we reviewed the legislative history of the ADA, which supports our conclusion that Congress did not intend the ADA to cover the type of discrimination alleged by the plaintiffs. The House Report accompanying the ADA mentions that

Last year, Congress amended the Fair Housing Act to prohibit discrimination against people with disabilities in the sale and rental of private housing. However, there are still no protections against discrimination by employers in the private sector, by places of public accommodation, by State and local government agencies that do not receive Federal aid, and with respect to the provisions of telecommunication services.

H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 2, at 47 (1990), reprinted in 1990 U.S.C.C.A.N. 267, 329 (emphasis added). We infer from the highlighted portion of this report that Congress did not intend the ADA to cover discrimination in the sale or rental of private housing, but rather intended the FHA to address such discrimination.

The Senate Report, moreover, lists the two purposes of the ADA: (1) to make the provisions of the Rehabilitation Act applicable to all public entities, regardless of whether they receive federal funding, and (2) to clarify the Rehabilitation Act with respect to public transportation. S. Rep. 116, 101st Cong., 2d Sess., at 12 (1989). Thus the ADA expanded the class of public entities that are covered under the act to those that do not receive federal

funds; and ADA did not expand the type of conduct covered.

Because the ADA does not apply to the type of discrimination alleged by plaintiffs, we will grant defendant's motion to dismiss with respect to the ADA claim.

An appropriate order follows.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JONATHAN COX, ANTHONY)	
LEGINE, CHARLES LATIMER, by)	
and through their next friend,)	
ROBERT MOCHAN;)	
SOUTHWINDS, INC.; and	)	Civil Action No.
RESIDENTIAL RESOURCES, INC.,	)	93-1443
)	
Plaintiffs,)	
)	
v.)	
TOWNSHIP OF UPPER ST.)	
CLAIR,)	
)	
Defendant.)	

ORDER

AND NOW, to-wit, this 18th day of May 1994, for the foregoing reasons, it is hereby ORDERED, ADJUDGED, and DECREED that defendant Township of Upper St. Clair's Motion to Dismiss (Doc. 10) be and hereby is

1. GRANTED with respect to plaintiffs' claims under the Rehabilitation Act and the Americans with Disabilities Act; and

2. DENIED with respect to plaintiffs' claims under the Fair Housing Act, the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the United States Constitution, and 42 U.S.C. § 1983.

/s/ Maurice B. Cohill, Jr.
Maurice B. Cohill, Jr.
U.S. District Judge

cc: Mark J. Murphy, Esq.
Pamela E. Berger, Esq.
Disabilities Law Project
1429 Fourth Avenue
1708 Law & Finance Building
Pittsburgh, PA 15210

Alan G. Blandino, Esq.
Horgan & Blandino
1040 Fifth Avenue
Pittsburgh, PA 15219

William R. Sittig, Jr., Esq.
909 Frick Building
Pittsburgh, PA 15219

James W. Harvey, Esq.
Israel & Wood
501 Grant Building
Pittsburgh, PA 15219

Robert N. Hackett, Esq.
Mark J. Christman, Esq.
Robert N. Hackett & Associates
1105 Boyce Road
Pittsburgh, PA 15241

Amy Reynolds Hay
Asst. United States Attorney

Isabelle M. Thabault, Esq.
Housing & Civil Enforcement Section
U.S. Department of Justice
P.O. Box 65998
Civil Rights Department
Washington, D.C. 20035-5998

Harvey L. Handley, III, Esq.
U.S. Department of Justice
P.O. Box 65998
Civil Rights Division
Washington, D.C. 20035-5998

In The
Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING
CODE COUNCIL, et al.,

Respondents,

and

UNITED STATES OF AMERICA.

On Writ Of Certiorari To The United States
Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

W. SCOTT SNYDER*
Counsel for City of Edmonds
OGDEN MURPHY WALLACE
1601 5th Avenue, #2100
Seattle, WA 98101
(206) 447-7000

WILLIAM SHEEHAN*
Counsel for Oxford House,
Inc., Oxford House-Edmonds
and Herb Hamilton
SHEA & GARDNER
1800 Massachusetts Ave. N.W.
Washington, D.C. 20036
(202) 828-2000

*Counsel of Record

NINA PILLARD*
GREGORY FRIEL
Counsel for United States
Assistant Solicitor General
Solicitor General's Office
Department of Justice
Washington, D.C. 20530
(202) 514-3876

ROBERT HELLER
Counsel for Oxford House,
Inc., Oxford House-Edmonds
and Herb Hamilton
RIDDELL, WILLIAMS, BULLITT
& WALKINSHAW
1001 4th Ave. Plaza, #4400
Seattle, WA 98154
(206) 624-3600

**Petition For Certiorari Filed 6/13/94
Certiorari Granted 10/31/94**

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* To Be Obtained By The U.S. Supreme Court Clerk.

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Filed: 9/29/92

Court of Appeals Docket #: 92-36735
Nsuit: 1443 Accommodations (USpl)
USA v. City of Edmonds
Appeal from: Western District of Washington (Seattle)

Case type information:

- 1) civil
 - 2) US
 - 3)
-

Lower court information:

District: 0981-2: CV-91-1273-WLD lead: CV-91-215-WLD
presiding judge: William L. Dwyer, District Judge
Date Filed: 2/13/91
Date order/judgment: 7/15/92
Date NOA filed: 9/14/92

Fee status: USA: no fee required

Prior cases:

None

Current cases:

Lead	Member	Start	End
consolidated:			
92-36640	92-36735	9/29/92	

Proceedings include all events,
92-36735 USA v. City of Edmonds

9/29/92 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N: y. setting schedule as follows: CADS due 10/13/92 for Robert S. Berman; appellant's designation of RT is due 9/24/92; appellee's designation of RT is due 10/5/92; appellant shall order transcript by 10/14/92; court reporter shall file transcript in DC by 11/16/92; certificate of record shall be filed by 11/23/92; appellant's opening brief is due 12/31/92; appellees' brief is due 1/30/93; appellant's reply brief is due 14 days from service of the answering brief. [92-36735] (jlc) [92-36735]

9/29/92 FILED CERTIFICATE OF RECORD ON APPEAL RT filed in DC N/A [92-36735] (jle) [92-36735]

10/13/92 Received notice of appearance of Irving Gornstein as counsel for USA (CASEFILE) [92-36735] (sm) [92-36735]

10/13/92 Filed Irving Gornstein for Appellant USA's Civil Appeals Docketing Statement served on 10/9/92 (to CONFATT) [92-36735] [92-36735] (sm) [92-36735]

11/2/92 Case released from Pre-Briefing Conference program. (jr) [92-36728 92-36729 92-36735 92-36778]

12/8/92 Filed order (Deputy Clerk: cb) Granting joint motion to consolidate cases. Setting schedule as follows: appellants' opening brief, excerpts due 12/31/92, appellees'

brief is due 2/1/93. The optional reply briefs are due 14 days from service of the answering brief. [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/20/92 Filed The American Assoc in 92-36640's motion to become amicus; served on 12/29/92. [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/28/92 10 day oral extension by phone of time to file Appellant Oxford House, Inc., Appellant Oxford House-Edmonds, Appellant Herb Hamilton brief. [92-36735, 92-36640] appellants' brief due 1/11/93; appellees' brief due 2/10/93 the optional reply brief due 14 days from service of the answering brief. (mag) [92-36640 92-36735]

12/31/92 Received Amicus The American Assoc in 92-36640's brief in 15 copies of 25 pages; deficient: pending motion; served on 12/29/92 Notified counsel. [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/11/93 Filed Appellee City of Edmonds in 92-36640, Appellant USA in 92-36735 response opposing motion & order to extend time to file appellant's opening brief [2276195-1] in 92-36735, 92-36735 served on 1/8/93 (MOOT) (CASEFILE) [92-36640, 92-36735] NOTE: referred to CIVAT on 1/29/93 by promo re: response request dismissal. (sf) [92-36640 92-36735]

1/12/93 Filed motion and deputy clerk order; (Deputy Clerk; ra) The government's motion for an extension of time in which to file the opening brief is granted in part. The government's opening brief is due 1/21/92.

- Aple's brief is due 2/22/93. The optional reply brief is due 14 days from service of the answering brief. (Motion recvd 1/4/93) [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/12/93 Filed original and 15 copies Appellant Oxford House, Inc. in 92-36640. Appellant Oxford House-Edmonds in 92-36640, Appellant Herb Hamilton in 92-36640 opening brief (Informal: n) 43 pages and five excerpts of record in 1volumes; served on 1/11/93 [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/14/93 Filed Washington State Department of Social and Health Services, Division of Alcohol and Substance Abuse motion to become amicus curiae. (CIVAT per promo re: response filed 1/11/93 requested dismissal of the Government's case and has been referred to CIVAT.) [92-36640, 92-36735] served on 1/11/93 [2278714] (sf) [92-36640 92-36735]
- 1/14/93 Received Amicus Washington State in 92-36640's brief in 15 copies of 39 pages; deficient: motion pending; served on 1/11/93 Notified counsel. [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/15/93 Filed order (John T. NOONAN); The American Association of Retired Person's motion to file an amicus brief, and any related filing shall be referred for disposition to the merits panel. [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/22/93 Filed original and 15 copies Appellant USA in 92-36735 opening brief (Informal: n) 21

- pages and five excerpts of record in 0 volumes; served on 1/21/93 (Excerpts filed in consolidated appt's brief) [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/25/93 Received correct mailing address for counsel Robert I. Heller. (CASEFILE) [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/25/93 Rec'd notice of appearance of Heller Robert [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 2/24/93 Filed original and 15 copies appellee City of Edmonds in 92-36640, City of Edmonds in 92-36735's 38 pages brief, 1 Exc. vols: ; served on 2/22/93 [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 3/12/93 Filed original and 15 copies USA's reply brief, (Informal: n) 9 pages; served on 3/11/93 [92-36735, 92-36640] (sm) [92-36640 92-36735]
- 3/12/93 Filed original and 15 copies Herb Hamilton in 92-36640, Oxford House-Edmonds in 92-36640, Oxford House, Inc. in 92-36640 reply brief of 21 pages; served on 3/11/93 [92-36640, 92-36735] (jlc) [92-36640 92-36735]
- 4/26/93 Filed order (Alfred T. GOODWIN, Mary M. SCHROEDER, William C. CANBY); Aple City of Edmonds motion to dismiss appeal no. 92-36735 for failure to prosecute is denied. The motion by the Washington State Department of Social and Health Service, Division of Alcohol and Substance Abuse to file an amicus brief is referred to the panel that considers consolidated appeals on the merits. [92-36640, 92-36735] (sf) [92-36640 92-36735]

4/29/93 Calendar check performed [92-36640, 92-36735] (th) [92-36640 92-36735]

10/26/93 Calendar materials being prepared. [92-36640, 92-36735] [92-36640, 92-36735] (aw) [92-36640 92-36735]

11/3/93 CALENDARED: Seattle January 5, 1994 9:00 a.m. Courtroom Park Place [92-36640, 92-36735] (mw) [92-36640 92-36735]

12/2/93 Filed order (Deputy Clerk: jc) The court has received motions for leave to submit briefs amicus curiae from the American Association of Retired Persons and the Washington State Department of Social and Health Service et al. The motion are GRANTED and the briefs heretofore lodged with the clerk of the court are ordered to be filed. in 92-36640, 92-36735 [92-36640, 92-36735] (PHONED AT 2:15 PM) (sf) [92-36735]

12/2/93 Filed order (Deputy Clerk: jc) The court has received motions for leave to submit briefs amicus curiae from the American Association of Retired Persons and the Washington of State partment of Social and Health Services, et al. The motion are GRANTED and the briefs heretofore lodged with the clerk of court ordered to be filed. (PHONED AT 2:15 PM) [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/10/93 Rec'd notice of appearance of Gregory Friel [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/14/93 Filed certified record on appeal in 4 Vols. (total): 0 Clerks Rec 4 RTs (ORIG) [92-36640, 92-36735] [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/17/93 Received notice of appearance of Rebecca K. Troth (Withdrew as counsel: attorney Gregory B. Friel for USA) (CASEFILE) [92-36735] (sm) [92-36735]

12/17/93 Received notice of appearance of Rebecca K. Troth as counsel for USA (CASEFILE) [92-36735] (sm) [92-36735]

12/29/93 Received Herb Hamilton, Oxford House-Edmonds Oxford House, Inc. additional citations, served on 12/27/93 (PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/3/94 Received Herb Hamilton, Oxford House-Edmonds, Oxford House, Inc. additional citations, served on 12/28/93. (COPIES SENT DIRECTLY TO DEPUTY CLERK IN SEATTLE FOR PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/5/94 SUBMITTED ON THE BRIEFS TO: Eugene A. WRIGHT, William C. CANBY, Thomas G. NELSON, [92-36640, 92-36735] (tsp) [92-36640 92-36735]

2/10/94 Received Oxford House, Inc. additional citations, served on 2/8/94 (PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

2/17/94 Received City of Edmonds, City of Edmonds additional citations, served on 2/14/94 (CIVATT) [92-36640, 92-36735] (sf) [92-36640 92-36735]

3/14/94 FILED OPINION, REVERSED AND REMANDED (Terminated on the Merits after Submission Without Oral Hearing; Reversed; Written, Signed, Published, Eugene A. WRIGHT, author; William C. CANBY; Thomas G. NELSON,) FILED AND

ENTERED JUDGMENT. [92-36640, 92-36735] (ft) [92-36640 92-36735]

4/6/94 MANDATE ISSUED [92-36640, 92-36735] (jr) [92-36640 92-36735]

7/12/94 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-23 filed on 6/13/94. [92-36640, 92-36735] (crw) [92-36640 92-36735]

11/4/94 Filed Supreme Court order (SC Date: 10/31/94) Granting certiorari petition. [92-36640, 92-36735] (sf) [92-36640 92-36735]

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Filed: 8/18/92

Court of Appeals Docket #: 92-36640
Nsuit: 3443 Accomodations (Fed)
City of Edmonds, et al v. WA State Bldg. Code, et al
Appeal from: Western District of Washington (Seattle)

Case type information:

- 1) civil
 - 2) private
 - 3)
-

Lower court information:

District: 0981-2: CV-91-215-WLD
presiding judge: William L. Dwyer, District Judge
Date Filed: 2/13/91
Date order/judgment: 7/15/92
Date NOA filed: 8/12/92

Fee status: paid

Prior cases:

None

Current cases:

	Lead	Member	Start	End
consolidated:				
	92-36640	92-36735	9/29/92	

Proceedings include all events,
92-36640 City of Edmonds, et al. v. WA State
Bldg. Code, et al

8/18/92 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): y; setting schedule as follows: CADS due 9/1/92 for Scott E. Schrum; appellant's opening brief is due 11/30/92, appellees' brief is due 12/28/92; appellants' reply brief is due 1/11/93. [92-36640] (mag) [92-36640]

8/18/92 Filed certificate of record on appeal RT filed in DC (7/15/92) [92-36640] (mag) [92-36640]

9/3/92 Filed attorney for Appellant Civil Appeals Docketing Statement served on 8/31/92 (to CONFATT) [92-36640] [92-36640] (sf) [92-36640]

9/10/92 Received copy of transcript order form from attorney Scott E. Schrum. (CASEFILE) [92-36640] (sf) [92-36640]

9/28/92 Case released from Pre-Briefing Conference program. (rv) [92-35376 92-36551 92-36562 92-36568 92-36571 92-36602 92-36614 92-36617 92-36626 92-36628 92-36631 92-36634 92-36637 92-36638 92-36640 92-36645 92-36655 92-36657 92-36666 92-36679]

11/24/92 Filed stipulation motion to consolidate cases. (PROMO) [92-36640] served on 11/20/92 (sf) [92-36640]

12/8/92 Filed order (Deputy Clerk: ob) Granting joint motion to consolidate cases. Setting schedule as follows: appellants' opening brief, excerpts due 12/31/92. appellees'

brief is due 2/1/93. The optional reply briefs are due 14 days from service of the answering brief. [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/20/92 Filed The American Assoc in 92-36640's motion to become amicus; served on 12/29/92. [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/28/92 10 day oral extension by phone of time to file Appellant Oxford House, Inc., Appellant Oxford House-Edmonds, Appellant Herb Hamilton brief. [92-36735, 92-36640] appellants' brief due 1/11/93; appellees' brief due 2/10/93 the optional reply brief due 14 days from service of the answering brief. (mag) [92-36640 92-36735]

12/31/92 Received Amicus The American Assoc in 92-36640's brief in 15 copies of 25 pages; deficient; pending motion; served on 12/29/92 Notified counsel. [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/11/93 Filed Appellee City of Edmonds in 92-36640, Appellant USA in 92-36735 response opposing motion & order to extend time to file appellant's opening brief [2276195-1] in 92-36735, 92-36735 served on 1/8/93 (MOOT) (CASEFILE) [92-36640, 92-36735] NOTE: referred to CIVAT on 1/29/93 by promo re: response request dismissal. (sf) [92-36640 92-36735]

1/12/93 Filed motion and deputy clerk order: (Deputy Clerk: ra) The government's motion for an extension of time in which to file the opening brief is granted in part. The government's opening brief is due 1/21/92.

Aple's brief is due 2/22/93. The optional reply brief is due 14 days from service of the answering brief. (Motion recvd 1/4/93) [92-36640, 92-36735] (sf) [92-36640 92-36735]

- 1/12/93 Filed original and 15 copies Appellant Oxford House, Inc. in 92-36640, Appellant Oxford House-Edmonds in 92-36640, Appellant Herb Hamilton in 92-36640 opening brief (Informal: n) 43 pages and five excerpts of record in 1 volumes; served on 1/11/93 [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/14/93 Filed Washington State Department of Social and Health Services, Division of Alcohol and Substance Abuse motion to become amicus curiae. (CIVAT per promo re: response filed 1/11/93 requested dismissal of the Government's case and had been referred to CIVAT.) [92-36640, 92-36735] served on 1/11/93 [2278714] (sf) [92-36640 92-36735]
- 1/14/93 Received Amicus Washington State in 92-36640's brief in 15 copies of 39 pages; deficient: motion pending; served on 1/11/93 Notified counsel. [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/15/93 Filed order (John T. NOONAN): The American Association of Retired Person's motion to file an amicus brief, and any related filings shall be referred for disposition to the merits panel. [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/22/93 Filed original and 15 copies Appellant USA in 92-36735 opening brief (Informal: n) 21

pages and five excerpts of record in 0 volumes; served on 1/21/93 (Excerpts filed in consolidated aplt's brief) [92-36640, 92-36735] (sf) [92-36640 92-36735]

- 1/25/93 Received correct mailing address for counsel Robert I. Heller, (CASEFILE) [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 1/25/93 Rec'd notice of appearance of Heller Robert [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 2/24/93 Filed original and 15 copies appellee City of Edmonds in 92-36640, City of Edmonds in 92-36735's 38 pages brief, 1 Exc. vols;; served on 2/22/93 [92-36640, 92-36735] (sf) [92-36640 92-36735]
- 3/12/93 Filed original and 15 copies USA's reply brief, (Informal: n) 9 pages; served on 3/11/93 [92-36735, 92-36640] (sm) [92-36640 92-36735]
- 3/12/93 Filed original and 15 copies Herb Hamilton in 92-36640, Oxford House-Edmonds in 92-36640, Oxford House, Inc. in 92-36640 reply brief of 21 pages; served on 3/11/93 [92-36640, 92-36735] (jlc) [92-36640 92-36735]
- 4/26/93 Filed order (Alfred T. GOODWIN, Mary M. SCHROEDER, William C. CANBY): Aple City of Edmonds motion to dismiss appeal no. 92-36735 for failure to prosecute is denied. The motion by the Washington State Department of Social and Health Service, Division of Alcohol and Substance Abuse to file an amicus brief is referred to the panel that considers consolidated appeals on the merits. [92-36640, 92-36735] (sf) [92-36640 92-36735]

4/29/93 Calendar check performed [92-36640, 92-36735] (th) [92-36640 92-36735]

10/26/93 Calendar materials being prepared. [92-36640, 92-36735] [92-36640, 92-36735] (aw) [92-36640 92-36735]

11/3/93 CALENDARED: Seattle January 5, 1994 9:00 a.m. Courtroom Park Place [92-36640, 92-36735] (mw) [92-36640 92-36735]

12/2/93 Filed order (Deputy Clerk: jc) The court has received motions for leave to submit breifs amicus curaie from the American Association of Retired Persons and the Washington of State partment of Social and Health Services, et al. The motion are GRANTED and the briefs heretofore lodged with the clerk of court ordered to be filed. (PHONED AT 2:15 PM) [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/10/93 Rec'd notice of appearance of Gregory Friel [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/14/93 Filed certified record on appeal in 4 Vols. (total): 0 Clerks Rec 4 RTs (ORIG) [92-36640, 92-36735] [92-36640, 92-36735] (sf) [92-36640 92-36735]

12/29/93 Received Herb Hamilton, Oxford House-Edmonds Oxford House, Inc. additional citations, served on 12/27/93 (PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/3/94 Received Herb Hamilton, Oxford House-Edmonds, Oxford House, Inc. additional citations, served on 12/28/93. (COPIES SENT DIRECTLY TO DEPUTY CLERK IN SEATTLE FOR PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

1/5/94 SUBMITTED ON THE BRIEFS TO: Eugene A. WRIGHT, William C. CANBY, Thomas G. NELSON. [92-36640, 92-36735] (tsp) [92-36640 92-36735]

2/10/94 Received Oxford House, Inc. additional citations, served on 2/8/94 (PANEL) [92-36640, 92-36735] (sf) [92-36640 92-36735]

2/17/94 Received City of Edmonds, City of Edmonds additional citations, served on 2/14/94 (CIVATT) [92-36640, 92-36735] (sf) [92-36640 92-36735]

3/14/94 FILED OPINION: REVERSED AND REMANDED (Terminated on the Merits after Submission Without Oral Hearing; Reversed; Written, Signed, Published, Eugene A. WRIGHT, author; William C. CANBY; Thomas G. NELSON.) FILED AND ENTERED JUDGMENT. [92-36640, 92-36735] (ft) [92-36640 92-36735]

4/6/94 MANDATE ISSUED [92-36640, 92-36735] (jr) [92-36640 92-36735]

7/12/94 Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 94-23 filed on 6/13/94. [92-36640, 92-36735] (crw) [92-36640 92-36735]

11/4/94 Filed Supreme Court order (SC Date: 10/31/94) Granting certiorari petition. [92-36640, 92-36735] (sf) [92-36640 92-36735]

Docket as of November 7, 1994 10:17 pm

Proceedings include all events.

2:91cv215 Edmonds, City of, et al v. US Dept of Housing
et al

TERMED
ONSOL DISC
MTNDDL CMPY
TERMED CONSOL
DISC MTNDDL
CMPY

U.S. District Court
U.S. District Court - Western Washington (Seattle)
CIVIL DOCKET FOR CASE #: 91-CV-215

Edmonds, City of, et al v.

US Dept of Housing et al

Filed: 02/13/91

Assigned to: Judge William L. Dwyer

Demand: \$0,000

Nature of Suit: 443

Lead Docket: None

Jurisdiction: US Defendant

Dkt# in other court: None

Cause: 42:405 Fair Housing Act

EDMONDS CITY OF, a
municipal corporation
plaintiff

Mark R. Bucklin
623-8861
[COR LD]
KEATING, BUCKLIN &
McCORMACK P.S.
800 5th Ave.
4141 SeaFirst 5th Ave.
Plaza
Seattle, WA 98104
623-8861

Phillip C. Raymond
447-7000

[COR LD NTC]

Walter Scott Snyder
447-7000

[COR LD NTC]

OGDEN, MURPHY &
WALLACE

1601 5TH AVE

2100 WESTLAKE CENTER
SEATTLE, WA 98101-1686
447-7000

EVERETT CITY OF, a
municipal corporation
plaintiff

Phillip C. Raymond
(See above)

[COR LD NTC]

Walter Scott Snyder
(See above)

[COR LD NTC]

UNITED STATES OF
AMERICA
plaintiff

Susan L. Barnes
442-5196

[COR LD]

U. S. ATTORNEY'S
OFFICE

800 5TH AVE

STE 3600

SEATTLE, WA 98104
553-7970

Howard R Griffin
202-514-4741

[COR LD]

U. S. DEPARTMENT OF
JUSTICE

Civil Rights Division

10th St. at Constitution
Ave. N.W.

Washington DC 20530
202-514-4741

v.

DEPARTMENT OF
HOUSING AND URBAN
DEVELOPMENT
defendant
[term 06/10/91]

Howard R Griffin
[term 06/10/91]
202-514-4741
[COR LD NTC]
U. S. DEPARTMENT OF
JUSTICE
Civil Rights Division
10th St. at Constitution
Ave. N. W.
Washington, DC 20530
202-514-4741

JACK KEMP, Secretary
defendant
[term 06/10/91]

Howard R Griffin
[term 06/10/91]
(See above)
[COR LD NTC]

RICHARD L BAUER,
Director, Region X, United
States Department of
Housing and Urban
Development
defendant
[term 06/10/91]

Howard R Griffin
[term 06/10/91]
(See above)
[COR LD NTC]

WASHINGTON STATE
BUILDING CODE
COUNCIL, STATE OF
WASHINGTON
defendant
[term 04/30/92]

Lawrence C. Watters
[term 11/26/91]
753-9670
[COR LD NTC]
ATTORNEY GENERAL'S
OFFICE
Special Litigation
7th Fl. Hwys/Lic Bldg.
PB-71
Olympia, WA 98504-8094
753-9670

Tommy Prud'homme
[term 04/30/92]
743-5060
[COR LD]
ATTORNEY GENERAL'S
OFFICE
905 Plum St., 3rd Floor
P.O. Box 40100
Olympia, WA 98504-0100
753-5060

OXFORD HOUSE, INC
defendant

Robert I Heller
624-3600
[COR LD NTC]
RIDDELL, WILLIAMS,
BULLITT &
WALKINSHAW
1001 4TH AVE PLAZA
SUITE 4400
SEATTLE, WA 98154-3028
624-3600

RB HAMILTON
defendant

Robert I Heller
(See above)
[COR LD NTC]

OXFORD HOUSE-
EDMONDS, an
unincorporated
Washington Association
defendant

Robert I Heller
(See above)
[COR LD]

OXFORD HOUSE-HOYT,
an Unincorporated
Washington Association
defendant
[term 04/30/92]

Robert I Heller
[term 04/30/92]
(See above)
[COR LD]

EDMONDS CITY OF, a
Municipal Corporation
defendant

Phillip C. Raymond
447-7000
[COR LD]
Walter Scott Snyder
447-7000
[COR LD]
OGDEN, MURPHY &
WALLACE
1601 5TH AVE
2100 WESTLAKE CENTER
SEATTLE, WA 98101-1686
447-7000

OXFORD HOUSE, INC
counter-claimant

Robert I Heller
624-3600
[COR LD NTC]
RIDDELL, WILLIAMS,
BULLITT &
WALKINSHAW
1001 4TH AVE PLAZA
SUITE 4400
SEATTLE, WA 98154-3028
624-3600

HERB HAMILTON
counter-claimant

Robert I Heller
(See above)
[COR LD NTC]

v.

EDMONDS CITY OF
counter-defendant

Phillip C. Raymond
447-7000
[COR LD NTC]
Walter Scott Snyder
447-7000
[COR LD NTC]
OGDEN, MURPHY &
WALLACE
1601 5TH AVE
2100 WESTLAKE CENTER
SEATTLE, WA 98101-1686
447-7000

EVERETT CITY OF
counter-defendant

Phillip C. Raymond
(See above)
[COR LD NTC]
Walter Scott Snyder
(See above)
[COR LD NTC]

=====

OXFORD HOUSE, INC
counter-claimant

Robert I Heller
624-3600
[COR LD NTC]
RIDDELL, WILLIAMS,
BULLITT &
WALKINSHAW
1001 4TH AVE PLAZA
SUITE 4400
SEATTLE, WA 98154-3028
624-3600

HERB HAMILTON
counter-claimant

Robert I Heller
(See above)
[COR LD NTC]

OXFORD HOUSE-
EDMONDS
counter-claimant

Robert I Heller
(See above)
[COR LD]

OXFORD HOUSE-HOYT
counter-claimant

Robert I Heller
(See above)
[COR LD]

v.

EDMONDS CITY OF
counter-defendant

Phillip C. Raymond
447-7000
[COR LD NTC]
Walter Scott Snyder
447-7000
[COR LD NTC]
OGDEN, MURPHY &
WALLACE
1601 5TH AVE
2100 WESTLAKE CENTER
SEATTLE, WA 98101-1686
447-7000

EVERETT CITY OF
counter-defendant

Phillip C. Raymond
(See above)
[COR LD NTC]
Walter Scott Snyder
(See above)
[COR LD NTC]

- 2/13/91 1 COMPLAINT (Summons(es) issued) receipt no. 184365 (md) [Entry date 02/15/91] [2:91cv215]
- 2/19/91 2 RETURN OF SERVICE executed upon defendant Washington State Bld, defendant Oxford House, Inc, defendant Herb Hamilton on 2/14/91 (md) [Entry date 02/20/91] [2:91cv215]
- 2/27/91 3 ATTORNEY APPEARANCE for defendant Washington State Bldg Code Council; Lawrence Watters-attorney (md) [Entry date 02/28/91] [2:91cv215]
- 2/27/91 4 AFFIDAVIT of service regarding attorney appearance [3-1] (md) [Entry date 02/28/91] [2:91cv215]
- 3/1/91 5 ORDER by Judge William L. Dwyer joint status rpt ddl set for 5/15/91 (cc: all counsel) (md) [2:91cv215]
- 3/1/91 6 ORDER by Judge William L. Dwyer regarding discovery and depositions (cc: all counsel) (md) [2:91cv215]
- 3/1/91 7 RETURN OF SERVICE executed upon defendant US Dept of Housing, defendant Jack Kemp, defendant Richard L Bauer on 2/14/91 (md) [Entry date 03/04/91] [2:91cv215]
- 3/5/91 8 ATTORNEY APPEARANCE for defendant Oxford House, Inc; Robert Heller - attorney (md) [Entry date 03/06/91] [2:91cv215]

- 3/18/91 9 ATTORNEY APPEARANCE for defendant Herb Hamilton; Robert Heller-attorney (md) [Entry date 03/19/91] [2:91cv215]
- 3/28/91 10 ANSWER to complaint [1-1] and COUNTERCLAIM by defendant Herb Hamilton, defendant Oxford House, Inc against plaintiff Edmonds, City of, plaintiff Everett, City of (md) [Entry date 03/29/91] [2:91cv215]
- 4/5/91 11 ATTORNEY APPEARANCE for defendant Richard L Bauer, defendant Jack Kemp, defendant US Dept of Housing; Howard R. Griffin-attorney (md) [Entry date 04/09/91] [2:91cv215]
- 4/5/91 12 CERTIFICATE of service re: notice of appearance (md) [Entry date 04/09/91] [2:91cv215]
- 4/10/91 13 MOTION by defendant to dismiss defts United States Dept of Housing and Urban Development, Jack Kemp and Richard L. Bauer, Oral Argument Requested noted for 4/26/91 (md) [Entry date 04/12/91] [2:91cv215]
- 4/10/91 14 MEMORANDUM by defendant in support of motion to dismiss defts United States Dept of Housing and Urban Development, Jack Kemp and Richard L. Bauer, Oral Argument Requested [13-1] (md) [Entry date 04/12/91] [2:91cv215]
- 4/10/91 15 CERTIFICATE of service re: motion to dismiss, et al (md) [Entry dated 04/12/91] [2:91 cv 215]

- 4/25/91 16 LETTER from defendant to con't motion to dismiss to May 24, 1991 (md) [Entry date 04/26/91] [2:91cv215]
- 5/15/91 17 JOINT STATUS REPORT filed by all parties. (md) [Entry date 05/16/91] [2:91cv215]
- 5/16/91 18 ORDER by Judge William L. Dwyer last date for adding new parties is 6/17/91; discovery ddl set for 12/27/91; mtn filing ddl set for 1/9/92; motions in limine to be filed by 2/20/92; pretrial order ddl set for 3/12/92; pretrial conf set for 11:00 3/16/92; trial brief ddl set for 3/26/92; trial set for 3/31/92 (cc: all counsel) (md) [2:91cv215]
- 5/28/91 19 STATEMENT by plaintiff of nonopposition in response to deft US Dept of Housing and Urban Development, Jack Kemp and Richard L. Bauer's motion to dismiss [13-1] (md) [Entry date 05/29/91] [2:91cv215]
- 5/28/91 20 AFFIDAVIT of service regarding statement [19-1] (md) [Entry date 05/29/91] [2:91cv215]
- 6/10/91 21 MINUTE ORDER: by WLD, granting motion to dismiss defts United States Dept of Housing and Urban Development, Jack Kemp and Richard L. Bauer [13-1] terminating defendant US Dept of Housing, defendant Jack Kemp, defendant Richard L Bauer (cc: all counsel) (md) [Entry date 06/11/91] [2:91cv215]
- 6/17/91 22 STIPULATION permitting pltfs to amend complaint (md) [Entry date 06/19/91] [2:91cv215]

- 6/17/91 - PROPOSED amended complaint (md)
[Entry date 06/19/91] [2:91cv215]
- 6/17/91 23 CERTIFICATE of service re: stipulation
permitting pltfs to amend complaint, etc
(md) [Entry date 06/19/91] [2:91cv215]
- 7/12/91 24 AMENDED COMPLAINT (second) [1-1]
by plaintiffs; adding Oxford House-
Edmonds, Oxford House-Hoyt (md)
[2:91cv215]
- 8/19/91 25 ANSWER to and COUNTERCLAIM by
defendant Herb Hamilton, defendant
Oxford House, Inc, defendant Oxford
House-Edmonds, defendant Oxford
House-Hoyt against plaintiff Edmonds,
City of, plaintiff Everett, City of (md)
[Entry date 08/20/91] [2:91cv215]
- 8/27/91 26 NOTICE by plaintiff Edmonds, City of OF
ASSOCIATION OF ATTORNEY Mark R.
Bucklin w/W. Scott Snyder (md)
[2:91cv215]
- 8/27/91 27 AFFIDAVIT of mailing regarding attorney
association [26-1] (md) [2:91cv215]
- 9/26/91 28 MINUTE ORDER: by WLD case consoli-
dated 2:91-cv-215 with member cases
2:91-cv-1273 all pleadings to be filed in
C91-215WD (cc: all counsel) (md) [Entry
date 09/27/91] [2:91cv215]
- 9/26/91 30 ATTORNEY APPEARANCE for defen-
dant Edmonds, City of; W.Costt Snyder-
attorney (md) [Entry date 10/02/91]
[2:91cv215]
- 9/27/91 29 ACCEPTANCE/ACKNOWLEDGEMENT
OF SERVICE by defendant Edmonds,

- City of on 9/19/91 (md) [Entry date
10/01/91] [2:91cv215]
- 10/9/91 31 ANSWER to by defendant City of
Edmonds (seal) [Entry date 10/10/91]
[2:91cv215]
- 10/10/91 32 CERTIFICATE of service re: answer (md)
[Entry date 10/11/91] [2:91cv215]
- 11/22/91 33 MOTION by plaintiff USA to extend time
to conduct discovery etc noted for
12/13/91 (md) [Entry date 11/25/91]
[2:91cv215]
- 11/22/91 34 AFFIDAVIT of Howard R. Griffin in sup-
port of motion to extend time to conduct
discovery etc [33-1] (md) [Entry date
11/25/91] [2:91cv215]
- 11/22/91 35 CERTIFICATE of service re: motion for
extension of time for discovery dates et al
(md) [Entry date 11/25/91] [2:91cv215]
- 11/26/91 36 SUBSTITUTION OF COUNSEL on behalf
of Washington State Bld in 2:91-cv-00215;
Tommy Prud'homme term attorney Law-
rence C. Watters for Washington State Bld
in 2:91-cv-00215 (md) [Entry date
11/27/91] [2:91cv215]
- 11/26/91 37 AFFIDAVIT of service by mailing regard-
ing attorney substitution [36-1] (md)
[Entry date 11/27/91] [2:91cv215]
- 12/2/91 38 MINUTE ORDER: by WLD, Counsel for
Deft WA State Bldg Code Council's notice
of substitution is deemed a motion for
leave to withdraw and substitution of
counsel is approved, unless any party
objects within 1 days of the date of this

- order (cc: all counsel) (md) [Entry date 12/04/91] [2:91cv215]
- 12/2/91 39 AMENDMENT by plaintiff USA in 2:91-cv-00215 to motion to extend time to conduct discovery etc [33-1] (md) [Entry date 12/04/91] [2:91cv215]
- 12/3/91 40 ORDER by Judge William L. Dwyer granting motion to extend time to conduct discovery etc [33-1] discovery ddl extended to 4/17/92; mtn filing ddl extended to 4/29/92; motions in limine to be filed by 6/11/92; pretrial order ddl extended to 7/2/92; pretrial conf extended to 9:30 7/6/92; trial brief ddl extended to 7/16/92; trial extended to 7/21/92 (cc: all counsel) (md) [Entry date 12/05/91] [2:91cv215]
- 4/7/92 41 NOTICE by plaintiff Edmonds, City of taking depo of Oxford House, Inc on 4/17/92 at 10:00 (md) [Entry date 04/08/92] [2:91cv215]
- 4/10/92 42 NOTICE by plaintiff Edmonds, City of taking depo of Oxford House Hoyt on 4/17/92 at 10:00; (md) [Entry date 04/13/92] [2:91cv215]
- 4/29/92 43 MOTION by plaintiff for summary judgment noted for 5/22/92 (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 44 NOTICE/LIST OF CITATIONS by plaintiff of the authorities you have been inactive for 90 seconds. Hit any key to remain connected. relied upon in pltf's motion for sj (md) [Entry date 04/30/92] [2:91cv215]

- 4/29/92 45 MEMORANDUM by plaintiff in support of motion for summary judgment [43-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 46 DECLARATION of mailing re motion for summary judgment [43-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 47 DECLARATION of service re motion for summary judgment [43-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 48 STIPULATION (Joint) for purposes of dispositive motions w/attachments (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 49 MOTION by plaintiff USA for partial summary judgment noted for 5/22/92 (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 50 MEMORANDUM by plaintiff USA in support of motion for partial summary judgment [49-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 51 APPENDIX filed by plaintiff USA to memorandum in support of motion for partial summary judgment [49-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 - LODGED ORDER: granting motion for partial summary judgment (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 52 CERTIFICATE of service re: USA motion for partial sj, et al (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 53 MOTION by defendant Herb Hamilton, defendant Oxford House, Inc for partial

- summary judgment, Request Oral Argument noted for 5/22/92 (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 54 MEMORANDUM by defendant Herb Hamilton, defendant Oxford House, Inc in support of motion for partial summary judgment, Request Oral Argument [53-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 55 DECLARATION of Scott Schrum re motion for partial summary judgment, Request Oral Argument [53-1] (md) [Entry date 04/30/92] [2:91cv215]
- 4/29/92 56 CERTIFICATION of J. Paul Molloy (md) [Entry date 04/30/92] [2:91cv215]
- 4/30/92 - LODGED ORDER: stipulation and order of dismissal as to deft Oxford House Hoyt and the WA State Bldg Code Council (md) [2:91cv215]
- 4/30/92 57 STIPULATION and ORDER by Judge William L. Dwyer: of dismissal of the City of Everett's complaint against defts Oxford House Hoyt and the WA State Bldg Code Council dismissing defendant Oxford House-Hoyt in 2:91-cv-00215, defendant Washington State Bld in 2:91-cv-00215 with prejudice and without costs to the respective parties (cc: all counsel) (md) [Entry date 05/04/92] [2:91cv215]
- 5/6/92 58 PRAECIPE: by plaintiff-USA, attached is signed by cnsl page 2 of the order re: motion for partial sj (md) [2:91cv215]
- 5/6/92 59 CERTIFICATE of service re: praecipe (md) [2:91cv215]

- 5/12/92 60 RESPONSE by defendants to Pltf City of Edmonds' motion for summary judgment [43-1] (md) [Entry date 05/13/92] [2:91cv215]
- 5/12/92 61 DECLARATION of Scott Schrum re motion response [60-1] (md) [Entry date 05/13/92] [2:91cv215]
- 5/15/92 - LODGED ORDER: re: motion for summary judgment (md) [2:91cv215]
- 5/18/92 62 BRIEF filed by plaintiff USA in opposition to City of Edmonds motion for summary judgment [43-1] (md) [Entry date 05/19/92] [2:91cv215]
- 5/21/92 63 REPLY BRIEF by plaintiff Edmonds, City of to Oxford House motion for sj (md) [2:91cv215]
- 5/21/92 64 LIST of citations of the Authorities relied upon in pltf's reply brief (md) [2:91cv215]
- 5/21/92 65 DECLARATION of mailing re reply [63-1] et al (md) [2:91cv215]
- 5/21/92 66 REPLY BRIEF by defendants Oxford House, Inc, Oxford House-Edmonds and Herb Hamilton in support of motion for sj [53-1] (md) [Entry date 05/26/92] [2:91cv215]
- 6/5/92 67 MINUTE ORDER: by Judge William L. Dwyer Oral Argument on the pending motions for sj set for 4:30 6/25/92. Counsel should plan on having 15 minutes per side (not per party). The date for completing pretrial steps are vacated pending decision on the sj motions. The trial date

- of 7/21/92 remains unchanged. (cc: all counsel) (md) [2:91cv215]
- 6/11/92 68 MOTION by plaintiff Edmonds, City of in limine (md) [Entry date 06/12/92] [2:91cv215]
- 6/11/92 -- LODGED ORDER: granting motion in limine (md) [Entry date 06/12/92] [2:91cv215]
- 6/12/92 69 MINUTE ORDER: by Judge William L. Dwyer striking motion in limine [68-1] without prejudice pending decision of the sj motions (cc: all counsel) (md) [Entry date 06/15/92] [2:92cv215]
- 6/15/92 70 MEMORANDUM by defendant Herb Hamilton, defendant Oxford House, Inc, defendant Oxford House-Edmonds in opposition to the US Request for continuance (md) [Entry date 06/16/92] [2:91cv215]
- 6/15/92 71 MOTION/NOTICE OF DECISION AND REQUEST FOR CONTINUANCE by plaintiff USA to continue the date for oral argument noted for 6/22/92 (md) [Entry date 06/16/92] [2:91cv215]
- 6/16/92 72 MINUTE ORDER: by Judge William L. Dwyer, that USA's notice of decision and request for continuance is deemed a motion to continue the date for oral argument. The motion is noted on shortened time for 6/22/92 and responses will be due on 6/18/92 and any reply on 6/19/92. (cc: all counsel) (md) [2:91cv215]

- 6/16/92 73 AFFIDAVIT of service re: request for continuance (md) [Entry date 06/17/92] [2:91cv215]
- 6/18/92 74 RESPONSE by plaintiff Edmonds, City of to motion to continue the date for oral argument [71-1] (md) [2:91cv215]
- 6/18/92 75 DECLARATION of service and mailing re motion response [74-1] (md) [2:91cv215]
- 6/19/92 76 MINUTE ORDER: by Judge William L. Dwyer, The request of the USA for a postponement of the oral argument is denied. Any counsel who wishes to take part in the hearing by speaker telephone rather than in person may do so provided advance arrangements are made w/law clerk. (cc: all counsel) (md) [Entry date 06/22/92] [2:91cv215]
- 6/25/92 77 MINUTES: WLD; Dep Clerk: Eileen; CR: Robert Molezzo; Oral argument held on sj motions held on 6/24/92 and a Written order to be issued. Paul Hancock admitted to practice in this dist for this hearing only. (md) [Entry date 06/26/92] [2:91cv215]
- 6/26/92 78 DECLARATION of Martha Aylas Dusenberry (md) [Entry date 06/29/92] [2:91cv215]
- 6/30/92 79 MINUTE ORDER: by Judge William L. Dwyer all dates for completion of pretrial steps are vacated and an order on motions for sj will follow; pretrial order ddl vacated 7/2/92; pretrial conf vacated 9:30 7/6/92; trial brief ddl vacated 7/16/92; trial vacated 7/21/92 (cc: all counsel) (md) [2:91cv215]

- 7/14/92 80 ORDER by Judge William L. Dwyer denying Oxford House and USA motion for partial summary judgment [53-1] [49-1], granting City of Edmonds motion for summary judgment [43-1] (cc: all counsel) (md) [Entry date 07/15/92] [2:91cv215]
- 7/15/92 81 JUDGMENT: by Judge William L. Dwyer, on cross motions for sj (cc: all counsel) (md) [2:91cv215]
- 7/15/92 84 TRANSCRIPT FILED, motions for summary judgment on 6/24/92 CR: Molezzo (mg) [Entry date 07/21/92] [2:91cv215]
- 7/17/92 82 MOTION by defendant for reconsideration of order to consider two unaddressed issues (oral argument requested) (md) [Entry date 07/20/92] [2:91cv215]
- 7/17/92 83 AFFIDAVIT of service regarding motion for reconsideration of order to consider two unaddressed issues (oral argument requested) [82-1] (md) [Entry date 07/20/92] [2:91cv215]
- 7/22/92 85 ORDER by Judge William L. Dwyer denying motion for reconsideration of order to consider two unaddressed issues [82-1] (cc: all counsel) (md) [2:91cv215]
- 8/12/92 90 NOTICE OF APPEAL by defendants from Dist. Court decision [81-1] (cc: CCA, WLD, all counsel) (mg) [Entry date 08/14/92] [2:91cv215]
- 8/12/92 -- APPEAL FEE RECEIVED: fee in amount of \$105.00 (Receipt #197928) (mg) [Entry date 08/14/92] [2:91cv215]

- 8/13/92 86 MOTION by plaintiff Edmonds, City of for attorney fees noted for 9/4/92 (ws) [Entry date 08/14/92] [2:91cv215]
- 8/13/92 87 MEMORANDUM by plaintiff Edmonds, City of in support of pltf's motion for attorney fees [86-1] (ws) [Entry date 08/14/92] [2:91cv215]
- 8/13/92 88 AFFIDAVIT of W. Scott Snyder in support of request for award of reasonable attorney fees [86-1] (ws) [Entry date 08/14/92] [2:91cv215]
- 8/13/92 89 DECL OF MAILING by plaintiff Edmonds, City of, of Motion [86] and supporting pldgs served on defts (ws) [Entry date 08/14/92] [2:91cv215]
- 8/14/92 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (mg) [2:91cv215]
- 8/14/92 -- CERTIFICATE OF RECORD Transmitted to USCA (cc: all counsel) (mg) [2:91cv215]
- 8/20/92 -- NOTIFICATION by Circuit Court of Appellate Docket Number 92-36640 (mg) [Entry date 08/27/92] [2:91cv215]
- 8/20/92 91 TIME SCHEDULE ORDER (CCA) 92-36640: certifrec. filed; open.br. and excerpts due 11/30/92; resp.br. due 12/28/92; optional reply br. due 14 days from svc. of resp.br. (mg) [Entry date 08/27/92] [2:91cv215]
- 8/31/92 92 MEMORANDUM by plaintiff USA in opposition to City of Edmonds motion for attorney fees [86-1] (md) [2:91cv215]

- 9/8/92 93 TRANSCRIPT DESIGNATION and Ordering Form for dates: 6/24/92 argument on sumjgt mtns. (already filed) (mg) [Entry date 09/10/92] [2:91cv215]
- 9/14/92 94 NOTICE OF APPEAL by plaintiff USA from Dist. Court decision [81-1]. Attached certificate of service. (cc: CCA, WLD, all counsel) (mg) [Entry date 09/17/92] [2:91cv215]
- 9/14/92 -- NO APPEAL FEE RECEIVED: appellant USA (mg) [Entry date 09/17/92] [2:91cv215]
- 9/17/92 -- APPEAL NOTIFICATION packet sent to CCA (cc: cnsl) (mg) [2:91cv215]
- 9/17/92 -- CERTIFICATE OF RECORD Transmitted to USCA (cc: all counsel) (mg) [2:91cv215]
- 9/22/92 95 ORDER by Judge William L. Dwyer denying City's motion for attorney fees [86-1] (cc: all counsel) (seal) [2:91cv215]
- 10/3/92 -- NOTIFICATION by Circuit Court of Appellate Docket Number 92-36735 (mg) [Entry date 10/07/92] [2:91cv215]
- 10/3/92 96 TIME SCHEDULE ORDER (CCA) 92-36735: trns.des. due 10/14/92; RT due 11/16/92; open.br. and excerpts due 12/31/92; resp.br. due 1/30/93; optional reply br. due 14 days from svc. of resp.br. (mg) [Entry date 10/07/92] [2:91cv215]
- 3/3/93 -- CLERK'S RECORD ON APPEAL transmitted to Circuit (4 vols orig) (mg) [2:91cv215]
- 4/9/94 97 MANDATE 92-36640, 92-36735): REVERSES AND REMANDS the decision

- of the District Court. Attached opinion. (cc: WLD, all counsel) (mg) [Entry date 04/19/94] [2:91cv215]
- 4/13/94 -- RECORD ON APPEAL returned from U.S. Court of Appeals (mg) [Entry date 04/14/94] [2:91cv215]
- 4/28/94 98 MINUTE ORDER: by Judge William L. Dwyer Status Conference set for 2:00 5/9/94. (cc: all counsel, WLD) (md) [Entry date 04/29/94] [2:91cv215]
- 5/5/94 99 MINUTE ORDER: by Judge William L. Dwyer, by agreement of cnsl for all parties as expressed in a phone conference previously set for 5/9/94 is cancelled. Cnsl are directed to advise the court promptly at such time as the US Supreme Court either grants or denies the petition for a writ of certiorari. (cc: all counsel, WLD, Eileen) (md) [Entry date 05/06/94] [2:91cv215]
- 11/7/94 100 ORDER by Judge William L. Dwyer removing case from active caseload pending the completion of review of the US Supreme Court. This order is entered for admin purposes and will not prejudice the rights of any party. The case will be restored to the active list, if necessary, following review by the Supreme Court. (cc: counsel, Judge) (seal) [2:91cv215]

[END OF DOCKET: 2:91cv215]

Docket as of October 26, 19123 11:13 am

Proceedings include all events.

2:91cv1273 USA v. City of Edmonds, WA

TERMED
CONSOL

TERMED CONSOL

U.S. District Court

U.S. District Court - Western Washington (Seattle)

CIVIL DOCKET FOR CASE #: 91-CV-1273

USA v. City of Edmonds, WA

FILED: 09/12/91

Assigned to: Judge

Nature of Suit:

William L Dwyer

443

Demand: \$0,000

Jurisdiction:

Lead Docket: 91-CV-215

US Plaintiff

Dkt# in other court: None

Cause: 42:405 Fair Housing Act

UNITED STATES
OF AMERICA
plaintiff

Susan L. Barnes

442-5196

[COR LD]

U.S. ATTORNEY'S OFFICE

800 5TH AVE

STE 3600

SEATTLE, WA 98104

553-7970

Howard R Griffin

202-514-4741

[COR LD]

U.S. DEPARTMENT OF JUSTICE

Civil Rights Division

10th St. at Constitution Ave.

N.W.

Washington, DC 20530

202-514-4741

v.

EDMONDS CITY OF,
a Municipal Corporation
defendant

- 9/12/91 1 COMPLAINT (Summons(es) issued in blank) fee waived (hh) [Entry date 09/16/91] [2:91cv215]
- 9/18/91 2 MINUTE ORDER: by BJR Case reassigned to Judge William L. Dwyer as related to C91-215WD (cc: all counsel,BJR,WLD) (rs) [2:91cv215]
- 9/26/91 3 MINUTE ORDER: by WLD, Case consolidated w/C91-215WD. All pleadings to be filed in that case no. (cc: all counsel) (md) [Entry date 09/27/91] [2:91cv215]

[END OF DOCKET: 2:91cv1273]

UNITED STATES DISTRICT COURT
IN AND FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,)	
WASHINGTON, a municipal	)	NO. C91-215WD
corporation and CITY OF	)	PLAINTIFFS'
EVERETT, WASHINGTON, a	)	COMPLAINT
municipal corporation,	)	FOR DECLARA-
Plaintiffs,	)	TORY RELIEF
vs.)	
UNITED STATES DEPARTMENT)	
OF HOUSING AND URBAN)	
DEVELOPMENT; JACK KEMP,)	
SECRETARY; RICHARD L. BAUER,)	
DIRECTOR, REGION X, UNITED)	
STATES DEPARTMENT OF)	
HOUSING AND URBAN)	
DEVELOPMENT; WASHINGTON)	
STATE BUILDING CODE)	
COUNCIL, STATE OF)	
WASHINGTON; OXFORD HOUSE,)	
INC.; and HERB HAMILTON,)	
Defendants.)	

COME NOW plaintiffs City of Edmonds, Washing-
ton, a municipal corporation, and City of Everett, Wash-
ington, a municipal corporation, by and through their
duly appointed counsel W. Scott Snyder and Phillip C.
Raymond, Ogden Murphy Wallace, and for their com-
plaint herein allege as follows:

1. NATURE OF ACTION.

1.1. This is an action brought by the Cities of Edmonds and Everett, Washington seeking declaratory relief that the definitions of their respective zoning codes defining family for the purpose of establishing a definition for and the density of single family zone are not on their face in violation of the Fair Housing Act and the Fair Housing Act Amendments of 1988 of Title VII of the Civil Rights Act of 1968, 42 U.S.C. § 3604 et seq. The Department of Housing and Urban Development is charged with investigation and administration of the investigation of complaints under the Act. It has advised Plaintiffs and their counsel that zoning ordinances which restrict the number of unrelated adults that may live in a single family residence impermissibly discriminate against disabled persons in violation of the rights granted under the Fair Housing Act.

2. JURISDICTION

2.1. This court's jurisdiction is based on 28 U.S.C. § 1331 (Federal question).

3. VENUE.

3.1. This court's venue is established pursuant to 28 U.S.C. § 1391(e).

4. PARTIES.

4.1. The City of Edmonds is an optional code city organized pursuant to the provisions of Title 38A of the Revised Code of Washington (RCW). The City of Everett is a charter city incorporated pursuant to its City Charter as authorized under the provisions of RCW Title 35.

4.2. Defendant United States Department of Housing and Urban Development (hereinafter "HUD") is the United States Government agency whose Secretary, Jack Kemp, is authorized to administer the provisions of the Fair Housing Act and the Fair Housing Act Amendments of 1988, 42 U.S.C. § 3601 et seq. These federal statutes authorize the Secretary and the Secretary's designee, to conduct investigations of complaints alleging the Fair Housing Act has been violated. If the Secretary determines an allegation involves the legality of a local zoning ordinance, the Secretary shall refer the matter to the U.S. Attorney General for action under 42 U.S.C. § 3614. Richard L. Bauer is the Director of Region X of HUD. Region X includes the State of Washington.

4.3. The Washington State Building Code Council is established pursuant to RCW Chapter 19.27 to administer and interpret the provisions of the State Building Code. RCW 19.27.050 requires Washington State's municipalities to enforce the provisions of the State Building Code. Any amendment of the State Building Code by a city which affects single family residential buildings is required to be specifically approved by the State Building Code Council. Municipal and other local building regulations are superseded by RCW 19.27.060.

4.4. Oxford House, Inc. ("Oxford House") is a non-profit organization doing business in Edmonds and Everett, Snohomish County, Washington as well as other locations nationwide. In Edmonds and Everett, Oxford House operates or seeks to operate residential treatment facilities or "3/4 way houses" for recovering drug addicts and alcoholics. These residential living arrangements are self-governing and consist of groups of 8 to 25 unrelated

adults, either male or female, and are established for the purpose of providing mutual support to recovering drug addicts and alcoholics. Oxford House has established, or is in the process of establishing, similar facilities at other Washington state locations.

4.5. Herb Hamilton owns residential real estate within the city of Edmonds at 8407 - 216th Street, S.W., Edmonds, Washington.

5. GENERAL ALLEGATIONS-CITY OF EDMONDS.

5.1. On or before July 20, 1990, Oxford House, Inc., through its agent Mark Spence leased from Herb Hamilton a single family residence located at 8407 - 216th Street S.W., Edmonds, Washington, (hereinafter "Edmonds 3/4 Way House"). Mr. Spence on behalf of Oxford House circulated a written description of Oxford House and the facility it intended to establish in Edmonds to neighbors of the 3/4 way house location. A copy of the communication is attached hereto as Exhibit "A" and incorporated fully by reference. The handwritten comments on the exhibit are the questions or opinions of the citizen complainant who received the description and do not represent the position or opinion of the Plaintiffs. In its materials Oxford House represents:

Experience of Oxford House has shown that from 8 to 25 members works well. A house with fewer than 6 individuals is difficult to maintain because of the small size of the group and the fact that any vacancy causes greater disruption of the financial welfare of the house than a vacancy in a larger house.

The materials indicate consenting unrelated individuals, either male or female, but not both, would reside in each house.

5.2. Following circulation of the written material, neighbors of the 3/4 way house began complaining to the City of Edmonds that occupation of the house by more than 6 unrelated adults violates the provisions of the Edmonds Community Development Code ("ECDC"). ECDC Chapter 16.20, and Section 16.20.010(a)(1) limit the primary use in single family residential zones to single family dwelling units. ECDC § 21.90.080 defines single family dwelling (unit) as a detached building . . . used by one family. . . . " ECDC 21.30.010 defines family:

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

Copies of ECDC Chapter 16.20, ECDC 21.90.080 and ECDC 21.30.010 are attached hereto as Exhibits "B", "C" and incorporated fully by this reference.

5.3. On July 20, 1990 Assistant City Planner Duane Bowman sent a letter notifying Mr. Spence on behalf of Oxford House, Inc. that the Edmonds Group Home was located in an RS-8 single family zone, which limited the maximum number of unrelated individuals who may live in the home to five persons. A copy of the letter is attached hereto as Exhibit "E". Similar notice was also sent to Herb Hamilton. Following receipt of the

neighbors' complaints, the code enforcement officer of the City of Edmonds investigated the complaint, finding that more than six unrelated male adults were occupying the premises. City of Edmonds filed complaints in Edmonds Municipal Court alleging violation of the Edmonds Community Development Code.

5.4. Apparently in response to the Edmonds notice, Oxford House, Inc. and Herb Hamilton filed complaints with the U.S. Department of Housing and Urban Development, Region X. HUD assigned these complaints case nos. 10-90-0308-1 and 10-90-0327-1. A copy of Oxford House's complaint is attached hereto as Exhibit "F"; Mr. Hamilton's complaint is substantially the same form. Copies of the complaints were served on the City of Edmonds.

5.5. Upon notification of the pendency of the complaints, and a demand from Mr. Robison, the City of Edmonds withdrew criminal complaints Nos. 37196, 37197, 37198 initiated in Edmonds Municipal Court against defendants Herb Hamilton, Mark Spence and Clayton Earls, respectively. Mr. Earls was a resident of Oxford House Edmonds 3/4 Way House at the date of initial inspection.

5.6. HUD investigator Tim Robison contacted Edmonds and its officials regarding the complaints. A conciliation meeting was arranged between various city officials, Mr. Robison and Ave' Quesada, another representative of Region X. At this meeting, HUD notified Edmonds' mayor, one of its Council members, its director of Community Services, Planning Director, city attorney,

building official and zoning official of HUD's interpretation of the Fair Housing Act. HUD's representatives advised the City's representatives that it is HUD's interpretation that a municipal ordinance that regulates groups of unrelated disabled persons differently than members of traditional family groups discriminates against disabled persons in violation of the Fair Housing Act Amendments. More specifically, Edmonds City officials were told the City ordinance's definition of "family" on its face discriminates against disabled persons because it permits an unlimited number of persons related by genetics, adoption or marriage to occupy a single family residence but limits the number of unrelated persons (and therefore unrelated disabled persons) that may occupy such a residence. Under HUD's interpretation, this limitation illegally restricts housing opportunities for the disabled in violation of the Fair Housing Act. This interpretation has not been the subject of a federal regulation or rule making.

5.7. The Fair Housing Act Amendments of 1988, 42 U.S.C. Section 3602(h) define handicap as:

- (1) A physical or mental impairment which substantially limits one or more of such persons' major life activities, (2) a record of having such impairment, or (3) being regarded as having such an impairment, that such term does not include current, illegal, use of or addiction to controlled substance as defined in Section 802 of Title XXI.

Throughout this complaint, disabled persons refers to persons defined as handicapped by this section.

5.8. HUD has adopted regulations defining "physical or mental impairment" to include "... drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism." 24 CFR Section 100.201(a)(2) (1989). The residents of Oxford House are alleged by Oxford House and HUD to be recovering drug addicts and alcoholics who are not currently abusing illegal drugs, and are, therefore handicapped, and entitled to the protections of the Fair Housing Act Amendments.

6. GENERAL ALLEGATIONS - CITY OF EVERETT

6.1. On or about September 1st, 1990, an agent of Oxford House, Ken Westphal, filed an application for construction permit to make improvements to a residential home located at 3232 Hoyt, in Everett, Washington. A copy of the application filed with the City of Everett Building Department is attached hereto as Exhibit "G". The application states that the proposed use of the building is for transitional housing, residential (3/4) way house, indicating that the tenant would be Oxford House, Inc. This building will be referred to hereafter as the Everett 3/4 Way House.

6.2. The Everett 3/4 way house is located at 3232 Hoyt, Everett, Snohomish County, Washington and is zoned R-5 Core Residential. The Everett Zoning Code (hereinafter "EZC") p. 14-01, Use Standards Table to R-5 Core Residential Zones provides for single family use in the type of structure located at 3232 Hoyt. EZC 3.010(64) defines family as follows:

Family means any number of persons related by blood, marriage or legal adoption and including foster children and exchange students living together as a single housekeeping unit. Family also means the following when living together as a single, not for profit housekeeping unit:

- a. a group of not more than four related and unrelated adults and their related minor children, but not to exceed a total of eight related and unrelated persons; or
- b. not more than eight disabled persons, whether adults or minors, living together in a consensual residential living arrangement, but not to exceed a total of eight persons.

For the purposes of this definition, an adult is a person eighteen years of age or older, and a minor child is a person under the age of eighteen years old.

A copy of EZC p. 14.01 and EZC 3.010(64) are hereby attached as Exhibit "H" and incorporated fully by this reference.

6.3. The State Building Code, Section 303(a) UBC (1988 Ed.) provides in pertinent part:

If the building official finds that the work described in an application for a permit and the plans, specifications, and other data filed therewith conform to the requirements of this code and *other pertinent laws and ordinances . . .* he shall issue a permit therefore to the applicant. [Emphasis added.]

6.4. According to the construction permit application, the Everett 3/4 way house would be operated by Oxford House, Inc. Defendant Oxford House, Inc., would

house unrelated female or male adults in excess of the plaintiff Everett's occupancy limits. These adults would be recovering drug addicts or alcoholics.

6.5. Tim Tyler, building official of the City of Everett, notified Oxford House's agent that the City of Everett is unable to approve the application at the present time because it does not comply with the Everett Zoning Code. Mr. Tyler's notification was based on Oxford House's representations that its use anticipates occupancy by eight or more unrelated adults and that the State Building Code requires different construction standards for the proposed use than for a family residence.

7. GENERAL ALLEGATIONS – STATE OF WASHINGTON

7.1. RCW Chapter 19.27 establishes the State Building Code Council. The State Building Code Council is responsible for administration of the State Building Code. The Council is charged with review of any amendment of the State Building Code by a local municipality which affects structures containing four or fewer dwelling units, including single family residences. The State Building Code adopted pursuant to RCW 19.27.031 currently consists of the 1988 version of the Uniform Building Code ("UBC") as amended by the State Building Code Council.

7.2. Washington cities are required to adopt and administer the State Building Code. Edmonds and Everett have both adopted the State Building Code and administer and enforce it through their building officials.

7.3. Section 407 of the UBC, 1988 edition (State Building Code) defines "family":

Family is an individual or two or more persons related by blood or marriage or a group of not more than five persons (excluding servants) who need not be related by blood or marriage living together in a dwelling unit.

7.4. The State Building Code directs the cities, as administrators and enforcement officials of the State Building Code, to require different standards and methods for construction or remodeling of a structure to be inhabited by groups of six or more unrelated adults than it would if the same structure were inhabited by a "family" of the same size.

7.5. Under the State Building Code, dwellings and lodging houses are classified as R-3 occupancies. The R-3 classification is limited to five (5) guest rooms (Section 413 UBC) and/or one family/five (5) persons unrelated by blood or marriage (Section 407 UBC). Occupancies which exceed these thresholds are classified as R-1, a classification for hotels and apartment houses. The R-1 classification requires a variety of health and safety requirements not required for R-3 dwellings. These additional requirements include but are not limited to one hour fire construction if the structure is more than two stories or if it has more than 3,000 square feet above the first story; if it contains a basement, it must have two separate exits; and the structure in certain instances may be required to have an automatic sprinkler system. These construction methods and requirements would be considered in reviewing the Everett 3/4 way house if occupied by its projected numbers of unrelated disabled persons.

7.6. State of Washington, Department of Community Development is charged, pursuant to RCW 70.128.180, to conduct surveys of the housing opportunities available to disabled persons and of the local zoning requirements pertaining to such housing, and to issue its report and recommendation with respect thereto by December 31, 1990. RCW 70.128.80 also requires development of a model local ordinance. The Department of Community Development circulated to plaintiffs a copy of the draft model ordinance. The draft model ordinance recommended limiting the number of unrelated adults in single family neighborhoods to six or fewer. It would not limit the number of persons related by blood or marriage that may reside in a single family residence.

7.7. The State of Washington, Department of Social and Health Services in October 1990 announced by press release that it is accepting applications for funding of residential treatment facilities and 3/4 transitional housing for recovering drug addicts and alcoholics of the type established by Oxford House. A copy of this press release is attached hereto as Exhibit "I". Public funds are available for the financing of these facilities. This funding will lead to further proliferation of 3/4 houses and residential treatment houses in the various cities of the state of Washington. Each house will be subject to the State Building Code. The majority of the houses will be located in cities whose ordinances differentiate between the number of unrelated adults and the number of related persons who may occupy single family structures.

8. INJURY, ADVERSE IMPACT AND NATURE OF GRIEVANCE

8.1. Plaintiffs are injured, adversely affected, and aggrieved by defendants' actions in interpreting and enforcing the Fair Housing Act of 1988 in an improper and inappropriate manner.

8.2. The citizens of plaintiffs who reside in the single family neighborhoods surrounding the 3/4 way houses will be adversely impacted in that the plaintiffs have and are being coerced to suspend enforcement of lawful zoning ordinances designed to protect single family neighborhoods by regulating their density.

8.3. The plaintiffs base their planning and zoning upon certain assumptions of density. These assumptions of density are based upon census and other historical data based on the existing definitions of single family and the number of residences in each community. The Plaintiffs' planning efforts include, but are not limited to, the siting of police and fire stations, and the planning, construction and maintenance of roads, sewers, water lines and other infrastructure. The validity of the planning assumptions and provision for current and future public improvements will be negatively impacted by defendants' improper and unlawful enforcement of the complaints.

8.4. Washington state statute, RCW Chapter 19.27, requires the plaintiffs to enforce the provisions of the State Building Code at the same time that they have been threatened by HUD, with civil litigation conducted by the U.S. Department of Justice if the plaintiffs enforce their zoning codes and the provisions of state law.

8.5. The plaintiffs are without an adequate remedy under the provisions of the Fair Housing Act in that the administrative investigation and civil action which follows, would delay enforcement of their ordinances and expose them to damages, civil penalties and the payment of attorneys' fees.

8.6. Declaratory relief is appropriate to prevent state and federal funding of 3/4 treatment facilities intended to be located at sites in conflict with local zoning ordinances. Declaratory relief is necessary to avoid administrative actions and litigation which would follow. It would also provide guidance to the State of Washington in its funding of 3/4 way houses.

8.7. The above-referenced enforcement activities of HUD and its Region X are improper and inconsistent applications of the Fair Housing Act. Discrimination protections afforded to disabled persons should be applied equally within the class of persons affected. Ordinances which limit occupancy in single family zones to persons related by blood or marriage or to specified numbers of unrelated persons do not illegally discriminate against disabled persons in that disabled persons related by blood or marriage may establish a residence in single family zones which meets valid local density limitations. Groups of unrelated disabled persons who wish to reside together and whose numbers are greater than permitted in a single family zone can establish their residence in an appropriate multi-family zone. Plaintiffs provide adequate multi-family residential housing opportunities and their density limits are based on neutral and objective criteria. Plaintiffs seek a declaration that the

occupancy limitations of the plaintiffs' single family residential zones established by their zoning ordinances are valid on their face and do not violate the provisions of the Fair Housing Act Amendments of 1988. Plaintiffs further seek a declaration that the differential construction and fire safety requirements of the Washington State Building Code based on its definition of family are also valid on their face and not in violation of the Fair Housing Act.

9. PRAYER FOR RELIEF

9.1. The allegations of the preceding divisions 1-8 and the paragraphs thereof are specifically incorporated into each of the following counts and prayers for relief as fully as if herein set forth.

9.2. WHEREFORE, plaintiffs City of Edmonds and Everett, request that the Court enter an Order affording Plaintiffs the following relief:

9.2.1. Declare Edmonds Community Development Code Sections 21.30.010, 21.90.080 and 16.20.010(a)(1); Everett Zoning Code Section 3.010(64) and Use Standard Table 14-01; and the Washington State Building Code, Section 407 UBC, 1988 edition valid on their face and not violative of the Fair Housing Act or the Fair Housing Act Amendments of 1988 and their respective protections from unlawful discrimination against disabled persons.

9.2.2. Enjoin and restrain the U.S. Department of Housing and Urban Development, Secretary Jack Kemp, Regional Director Richard L. Bauer, and HUD's agents and employees from relying on or applying any

definition or interpretation of Fair Housing Act Amendments of 1988, which would find the Plaintiffs' single-family definitions and the occupancy limits applicable to their respective single-family zones to be invalid on their face and, therefore, in violation of the Fair Housing Act Amendments of 1988.

9.2.3. Such other necessary and further relief as the court in its discretion may grant, including but not limited to, costs and attorney fees incurred herein.

Respectfully submitted this 13 day of February, 1991.

OGDEN MURPHY WALLACE

By: /s/ W. Scott Snyder
WSBA No. 12835

/s/ Phillip C. Raymond
WSBA No. 12998
Attorneys for
City of Edmonds
and City of Everett

Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,)	
et al.,)	
Plaintiffs,)	
v.	)	NO. C91-215WD
WASHINGTON STATE BUILDING)	
CODE COUNCIL, et al.,)	
Defendants.)	
<hr/>		
UNITED STATES OF AMERICA,)	
Plaintiff,	)	NO. C91-1273WD
v.	)	DECLARATION
CITY OF EDMONDS,	)	OF
Defendant.	)	ROBERT
	)	DELANEY

My name is Robert Delaney and I make this declaration pursuant to the provisions of 28 U.S.C. 1746.

1. Currently I am the Residential Services Manager, Division of Alcohol and Substance Abuse (DASA), Washington State Department of Social and Health Services (DSHS).

2. Among my responsibilities are facilitating the establishment of self-run, self-supporting homes for recovering alcoholics and addicts in communities within the State of Washington.

2. The State of Washington receives federal block grant funds for drug and alcohol abuse and mental health services. As a condition of the receipt of those funds, the state is required by the Anti-Drug Abuse Act of 1988, 42 U.S.C. 300z-4a, to establish, directly or through the provision of a grant or a contract to a non-profit private entity, a \$100,000 revolving fund for the purpose of providing loans of not more than \$4,000.00 to groups of recovering alcoholics or drug addicts to cover the costs of establishing housing in which those recovering individuals may reside in groups of not less than four. Loans made from the revolving funds must be repaid within two years. This Department makes loans only to entities which agree that (a) the use of alcohol and illegal drugs in the group home will be prohibited; (b) any resident who uses alcohol or illegal drugs will be expelled from the home; (c) the residents of the home will pay all costs of the home, including rent and utilities; and (d) the residents of the group home will, by majority vote, establish policies governing residence in the home, including admissions policies.

3. DSHS has made start-up loans to seventeen Oxford Houses in eleven communities, including Oxford House-Edmonds, from the revolving fund.

4. Under this program the number of persons that a proposed Oxford House would contain is a critical factor for the following reasons:

- A. A significant number of individuals residing in Oxford Houses are receiving public financial assistance and, therefore, have

limited ability to pay for safe, sober, affordable housing in areas conducive to continued recovery. The financial benefits of grouping several recovering individuals in one home is that the combined purchasing power allows them to access a much more desirable housing arrangement.

- B. Another benefit inherent in a large number of recovering individuals residing in a single residence is the support the group provides to individuals, either at mandatory weekly house meetings or simply through association.
- C. The population of any Oxford House is constantly in transition with some individuals leaving (most because it's time for them to integrate back into mainstream life), other individuals coming out of treatment and becoming part of an Oxford House for the first time, and still others continuing their Oxford House program. Stability is a major reason for the success of the Oxford House program and an important reason Oxford Houses remain stable is due largely to the number of individuals required to make them work, both financially and programatically. Fewer individuals would have a definite negative impact on the ability of a house to maintain a core group throughout these transitions and would surely jeopardize their success and existence.

5. My involvement in the establishment of the Edmonds Oxford House was that of an administrator. Soon after Edmonds Oxford House was rented from Herb Hamilton, the landlord, I met with Mark Spence (the

DASA-contracted outreach person) at the house for the purpose of delivering loan funds, touring the house, and meeting the landlord and the residents. Once neighborhood concern regarding the Oxford House became apparent, a plan was formulated by Mr. Spence and the residents of the house to hold a neighborhood meeting for the purpose of informing those concerned about the Oxford House program. Mr. Spence informed me of the plan and I agreed that it was a good first step. The meeting went well and to my knowledge there have been no further complaints from the neighbors. However, quite some time after the community meeting I received a telephone call from the Edmonds city planner. He wanted to discuss concerns the city had with Oxford House's policy of having more than five unrelated individuals in a single family residence. I offered him the same explanation as made in the three points above. I heard nothing more about the situation at the Oxford House in Edmonds until the national office of Oxford House, Inc., in Virginia informed me about the pending litigation.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 27th day of April 1991.

/s/ Robert Delaney
ROBERT DELANEY

Hon. William L. Dwyer

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,)	
WASHINGTON, a	)	No. C 91-215 WD
municipal corporation)	
and CITY OF EVERETT,)	
WASHINGTON, a	)	AMENDED ANSWER
municipal corporation,	)	AND COUNTERCLAIMS
	)	OF DEFENDANTS
Plaintiffs,	)	OXFORD HOUSE, INC.
	)	HERB HAMILTON,
v.	)	OXFORD HOUSE-
WASHINGTON STATE	)	EDMONDS AND HOYT
BUILDING CODE	)	RECOVERY HOUSE
COUNCIL, STATE OF)	
WASHINGTON,)	
OXFORD HOUSE, INC.,)	
a Maryland)	
not-for-profit)	
corporation, HERB)	
HAMILTON, OXFORD)	
HOUSE-EDMONDS, an)	
unincorporated)	
Washington association,)	
and HOYT RECOVERY)	
HOUSE, an)	
unincorporated)	
Washington association,)	
Defendants.)	
)	

Defendants Oxford House, Inc., Herb Hamilton,
Oxford House-Edmonds and Hoyt Recovery House

("Defendants"), in answer to the second amended complaint of Plaintiffs City of Edmonds and City of Everett, respectfully deny each and every allegation contained therein not expressly admitted below. Defendants further respond to each separate paragraph of the complaint as follows:

I.

1. Admit paragraph 1.1.
2. Admit paragraph 2.1.
3. Deny that venue lies under 28 U.S.C. 1391(e).
4. PARTIES

4.1. Aver that Defendants lack sufficient knowledge upon which to form a belief as to the allegations contained in paragraph 4.1.

4.2. State that the provisions of RCW 19.27 speak for themselves.

4.3. Admit that Oxford House, Inc. is a non-profit organization. Admit that Oxford House, Inc., assists recovering alcoholics and drug addicts to establish self-run, self-supported residential housing, ("individual recovery houses"), and that some of these hold membership charters from Oxford House, Inc., ("individual Oxford Houses"). Deny all other allegations in the first sentence of paragraph 4.3. Deny that Oxford House, Inc. operates or seeks to operate any residential treatment facilities or "3/4 way houses" for recovering alcoholics and drug addicts in Edmonds and Everett. Deny that individual recovery houses or individual Oxford Houses

are residential treatment facilities or "3/4 way houses." Admit that individual recovery houses or individual Oxford Houses, including Oxford House-Edmonds and the individual recovery house presently at 3232 Hoyt, Everett, Washington ("Hoyt Recovery House"), are self-governing. To the extent that it is alleged that individual Oxford Houses, including Oxford House-Edmonds, are not single-sex residences, this allegation is denied. To the extent that it is alleged that Hoyt Recovery House is not a single-sex residence, this allegation is denied. Admit that individual Oxford Houses consist of groups of 8 to 25 adults. To the extent that it is alleged that Oxford House-Edmonds or Hoyt Recovery House have more than 12 residents, this allegation is denied. Admit that individual recovery houses and individual Oxford Houses, including Oxford House-Edmonds and Hoyt Recovery House, are established for the purpose of providing mutual support to recovering drug addicts and alcoholics. To the extent that the last sentence of paragraph 4.3 alleges that Oxford House, Inc. is solely responsible for the founding of new individual recovery houses and new individual Oxford Houses, this allegation is denied. To the extent that it is alleged that the phrase "similar facilities," contained in the last sentence of paragraph 4.3 refers to residential treatment facilities or "3/4 way houses," this allegation is denied.

4.4. Admit the allegations of paragraph 4.4.

4.5. Admit the allegations of the first sentence of paragraph 4.5. Deny that Oxford House-Edmonds operates a residential treatment facility or "3/4 way house" in Edmonds, Washington.

4.6. Admit that there is an individual recovery house presently at 3232 Hoyt, Everett, Washington, known as Hoyt Recovery House. Aver that Hoyt Recovery House is the successor-in-interest to Oxford House-Hoyt. Admit to all other allegations of the first sentence of paragraph 4.6. Deny that Hoyt Recovery House operates a residential treatment facility or "3/4 way house" in Everett, Washington.

5. CITY OF EDMONDS

5.1. Admit that Mark Spence is an employee of Oxford House, Inc. To the extent that it is alleged that Mark Spence is an employee of Oxford House-Edmonds, this allegation is denied. To the extent that it is alleged that Oxford House, Inc., leases the residence at 8407 216th Street S.W., Edmonds, Washington, this allegation is denied. To the extent that it is alleged that the phrase "3/4-way House", contained in the first and second sentences of paragraph 5.1, refers to a residential treatment facility, this allegation is denied. Admit that Mark Spence provided information concerning Oxford House-Edmonds to the neighbors of that residence. Deny that Exhibit A is a true and correct copy of the Oxford House, Inc. circular. State that Exhibit A speaks for itself. Aver that Defendants lack sufficient knowledge upon which to form a belief as to the allegations concerning the origin of the handwritten comments on Exhibit A. Aver that Defendants lack sufficient knowledge upon which to form a belief as to the allegations concerning the position of Plaintiffs with regards to the content of the handwritten comments on Exhibit A.

5.2. To the extent that it is alleged that the phrase "3/4-way house" refers to a residential treatment facility, this allegation is denied. Aver that Defendants lack sufficient knowledge upon which to form a belief as to the allegation that neighbors complained to the City of Edmonds. Aver that Defendants lack sufficient knowledge upon which to form a belief as to the allegation concerning the nature and substance of such complaints, if any; e.g., that residents had knowledge of specific provisions of the Edmonds Community Development Code or cited these provisions to city officials or based their complaints solely upon these provisions. State that Chapter 16.20, Section 16.20.010(a)(1), Section 21.90.080, and Section 21.30.010 of the Edmonds Community Development Code speak for themselves.

5.3. Admit that Duane Bowman sent a letter to Mr. Spence on July 20, 1990. State that Exhibit E speaks for itself. Admit that a copy of this July 20, 1990 letter was mailed to Herb Hamilton. Aver that Defendants lack sufficient knowledge upon which to form a belief as to any other allegations contained in paragraph 5.3.

5.4. Admit that Defendants Oxford House, Inc. and Herb Hamilton filed complaints with the United States Department of Housing and Urban Development. State that Exhibit F speaks for itself. Aver that Defendants lack sufficient knowledge upon which to form a belief as to whether the City of Edmonds was served with such complaints. Deny any other allegations in paragraph 5.4.

5.5. Admit that the City of Edmonds filed criminal complaints against defendant Herb Hamilton, and against Mark Spence and Clayton Earls, respectively.

Aver that Defendants lack sufficient knowledge upon which to form a belief as to why these criminal complaints were withdrawn. Admit that Mr. Earls was a resident of Oxford House-Edmonds. To the extent that it is alleged that the phrase "3/4-way house" refers to a residential treatment facility, this allegation is denied.

5.6. Aver that Defendants lack sufficient knowledge upon which to form a belief as to any allegations contained in paragraph 5.6.

5.7. State that 42 U.S.C. § 3602(h) speaks for itself.

5.8. State that Title 24, Code of Federal Regulations, Section 100.201(a)(2) speaks for itself. Admit that the residents of residences affiliated with Oxford House, Inc., including Oxford House-Edmonds, are recovering alcoholics and drug addicts who are not abusing illegal drugs, and are entitled to the protection of the Fair Housing Act, as amended.

6. CITY OF EVERETT

6.1. Deny that Ken Westphal is an agent of Oxford House, Inc. or of Hoyt Recovery House. State that Exhibit G speaks for itself. Deny that Exhibit G indicates that Oxford House, Inc. is the tenant of the residence at 3232 Hoyt. Deny that Oxford House, Inc., is the tenant of the residence of 3232 Hoyt. To the extent that it is alleged that the phrase "Everett 3/4 way House" refers to a residential treatment facility, this allegation is denied. To the extent that it is alleged that Hoyt Recovery House is a transitional housing facility, this allegation is denied.

6.2. To the extent that it is alleged that the phrase "Everett 3/4 Way house" refers to a residential treatment facility, this allegation is denied. Admit that Hoyt Recovery House is located at 3232 Hoyt, Everett, Washington. Aver that Defendants lack sufficient knowledge to form a belief as to whether 3232 Hoyt is in an R-5 Core Residential zone. State that the Everett Zoning Code speaks for itself.

6.3. State that the Washington state Building Code, Section 303(a) speaks for itself.

6.4. Deny that Exhibit G states that Hoyt Recovery House would be operated by Oxford House, Inc. State that Exhibit G speaks for itself. To the extent that it is alleged that Hoyt Recovery House was or is operated by Oxford House, Inc., this allegation is denied. To the extent that it is alleged that the phrase "3/4 way house" refers to residential treatment facility, this allegation is denied. To the extent it is alleged that Hoyt Recovery House is not a single-sex residence, this allegation is denied. To the extent the second sentence of paragraph 6.4 contains a legal conclusion that the number of residents of Hoyt Recovery House exceeds the occupancy limits of the Everett Zoning Code, Defendants state that the Everett Zoning Code speaks for itself. Admit that the residents of Hoyt Recovery House are recovering alcoholics and drug addicts.

6.5. Aver that Defendants lack sufficient knowledge upon which to form a belief as to all allegations contained in the first sentence of paragraph 6.5. To the extent the first sentence of paragraph 6.5 alleges that Ken

Wastphal is an agent of Oxford House, Inc., this allegation is denied. Aver that Defendants lack sufficient knowledge as to form a belief as to the allegation concerning the basis of Mr. Tyler's notification, if any. Admit that more than eight persons reside at Hoyt Recovery House. State that the Washington state Building Code speaks for itself.

7. STATE OF WASHINGTON

7.1. The allegations contained in paragraphs 7.1 to 7.7 are not asserted against Defendants and do not require answer by Defendants. State that all laws and regulations cited in paragraphs 7.1 to 7.7 speak for themselves. State that the draft model ordinance of the Washington state Department of Community Development, discussed in paragraph 7.6, speaks for itself. State that all exhibits cited in paragraph 7.1 to 7.7 speak for themselves.

8. INJURY ALLEGATIONS

8.1 The allegations contained in paragraph 8.1 are not asserted against Defendants and do not require answer by Defendants. By order of this court, the United States Department of Housing and Urban Development ("H.U.D.") was dismissed as defendants from this action. Defendants aver that the injury allegations concerning H.U.D. in paragraph 8.1 to 8.8 are without merit.

8.2. Deny the allegations contains in paragraph 8.2.

8.3. Aver that defendants lack sufficient knowledge to form a belief as to the allegations contained in the third sentence of paragraph 8.3. Deny all other allegations contained in paragraph 8.3.

8.4. State that Title 24, Code of Federal Regulations § 100.10(3) speaks for itself. Deny all other allegations contained in paragraph 8.4.

8.5. State that RCW 19.27 speak for itself. Aver that Defendants lack sufficient knowledge upon which to form a belief as to any other allegations contained in paragraph 8.5.

8.6. Deny the allegations contained in paragraph 8.6.

8.7. Deny the allegations contained in paragraph 8.7. To the extent that it is alleged that the phrase "3/4 way house" refers to a residential treatment facility, this allegation is denied.

8.8. Deny all allegations contained in paragraph 8.8.

II.

AFFIRMATIVE DEFENSES

9. Defendants hereby restate all responses set forth by Defendants in paragraphs 1 through 8.8 above.

10. Plaintiffs' Complaint fails to state a claim upon which relief can be granted.

III.

COUNTERCLAIMS

11. Defendants hereby restate all responses set forth by Defendants in paragraphs 1 through 10 above.

12. Jurisdiction of these counterclaims lies under 28 U.S.C. § 1331, 28 U.S.C. § 1343(a)(3), 42 U.S.C. § 1983 and 42 U.S.C. § 3613(a)(1)(A). Venue for these claims rests under 28 U.S.C. § 1391(b).

Statement of Facts

13. Oxford House, Inc. assists recovering alcoholics and drug addicts to establish self-governing, self-supporting residences. It also serves as an information clearinghouse for these residences.

14. Oxford House-Edmonds and Hoyt Recovery House are self-governing, self-financing residences. Both were established by recovering alcoholics and drug addicts who then resided in the homes. Each house is a community in which the residents support and care for each other in order to help themselves control and master their alcoholism or drug addictions.

15. Oxford House, Inc. has no role in the affairs of either house, and provides no financial support to either house. Oxford House, Inc. assisted the residents of Oxford House-Edmonds and Hoyt Recovery House in locating a house and landlord, and assisted them with their applications for start-up loans from the State of Washington under the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-4a.

16. Oxford House-Edmonds leases its premises from Herb Hamilton.

17. Oxford House-Edmonds holds a charter from Oxford House, Inc. To hold a charter, Oxford House-Edmonds must expel any member who uses drugs or alcohol, be financially self-supporting and be democratically governed. Hoyt Recovery House, pursuant to 42 U.S.C. § 300x-4a, is also self-financing, democratically governed, and expels any resident who uses drugs or alcohol.

18. Oxford House-Edmonds has 10 male residents. Hoyt Recovery House has 11 male residents. The residents live in a supportive, alcohol-free and drug-free home. Any member who is found to use alcohol or drugs, whether in the house or not, is expelled.

19. Each house is self-run and self-supporting. The residents elect a President, Treasurer, Comptroller and Secretary. The residents have weekly group meetings. All votes are on a majority basis, except an 80% vote is required to admit a new member.

20. The residents at Oxford House-Edmonds and Hoyt Recovery House benefit substantially from living as a single housekeeping unit. The residents relate to each other like a family. The emotional and mutual support and bonding given each resident in support of his recovery from the mutually-shared tragedy of drug addiction or alcoholism is the equivalent of the type of love and support received in a traditional family.

21. The residents of each house function like a family. The residents of the house share cooking, shopping,

cleaning and decision-making responsibilities for their respective houses, as well as the expenses for running the house. They share means with each other. They live together and share the common rooms in the house and are jointly responsible for performing all of the household chores.

22. The residents of the two houses have conducted themselves as families in other ways. The residents of each house chose to live in good, safe, residential neighborhoods, and to rent single family dwellings. The out-sides of Oxford House-Edmonds and Hoyt Recovery House are indistinguishable as to use or function from the surrounding single family homes in the neighborhood.

23. Having a home is essential to each resident's successful control of his dependency. A home, unlike separate apartments, allows the residents to interact with each other, form friendships, foster cohesiveness, and allows the residents to support each other in controlling their drug and alcohol addictions.

24. Each house needs several residents to successfully function and remain financially self-sufficient. Most of the residents are employed. However, some must still rely on public assistance. The zoning-imposed limits on unrelated persons living together would prevent the residents from affording their living expenses or from achieving the sense of community needed to make the house work.

25. Oxford House-Edmonds and Hoyt Recovery House are not halfway houses or 3/4-way houses. They have no government sponsorship or regulation. They are

not treatment facilities, residential or otherwise. They have no paid or volunteer staff. They are not transitional; a resident may stay as long as he likes so long as he pays his bills and refrains from using drugs or alcohol.

26. In July and August of 1990, the City of Edmonds first tried to prevent any residents from moving into Oxford House-Edmonds, and then attempted to arrest and convict Herb Hamilton, its landlord, Mark Spence, a representative of Oxford House, Inc., and a resident of that house, Clayton Earls, for alleged zoning code violations.

27. In the fall of 1990, the City of Everett denied a construction permit application submitted by the landlord of Hoyt Recovery House, on the basis that the residents of Hoyt Recovery House did not comply with the definition of a family in the City's zoning code.

28. In January, 1991, the City of Everett, referring to the recent passage of the federal Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, enacted a new definition of "family" to limit the number of disabled persons who could live together to 8. Everett City Ordinance No. 1770-91; See Exhibit H of Plaintiffs' Complaint. Officials of the City of Everett rely upon this ordinance and the Everett Zoning Code in their attempt to prevent more than 8 people from residing at Hoyt Recovery House.

29. The acts of the Cities of Edmonds and Everett would deny the residents of Oxford House-Edmonds and Hoyt Recovery House their constitutional and statutory rights to live normal lives. If forced to reduce the number of residents, the houses cannot support themselves and

will cease to function. Without a supportive home environment, many if not most residents will fail to control their alcoholism and drug dependencies.

30. Further, the cities of Edmonds and Everett have, intentionally or unintentionally, singled out the residents of the houses for discriminatory treatment. Defendants allege that both cities have a policy or practice of lax enforcement of their zoning restrictions regarding the number of persons who may live together in a single-family zone, and that the enforcement of these codes against the residents of Oxford House-Edmonds and Hoyt Recovery House is an extraordinary exception from these policies or practices. Defendants further allege that the enforcement of the cities' zoning codes is either motivated by discriminatory intent, or works a discriminatory impact upon the residents of Oxford House-Edmonds and Hoyt Recovery House.

31. In addition, the City of Everett has intentionally discriminated against Hoyt Recovery House by denying its landlord's construction permit. The City of Everett's stated ground for denying the permit was because the residence was located in a single-family zone. Yet of the thirteen other lots which front Hoyt Street's 3200 block, over half are occupied by other than single-family homes: two professional office buildings with parking lots, two sixplexes (on one lot), one twelve-unit apartment building, and three houses converted into apartments, containing six, five, and three apartments, respectively. In addition, Rucker Street, the street immediately west of Hoyt Street, is a four-lane boulevard fronted, on both sides, by commercial buildings. Across the street from Hoyt Recovery House and to the south is a six-unit

apartment building. Both the 3300 and 3400 blocks between Hoyt and Rucker are occupied by the main Everett Post Office. Across the street from the Post Office, in the 3300 block of Hoyt, is the Planned Parenthood building, a combination office building and medical clinic.

Counterclaims

32. The acts of the City of Edmonds in trying to arrest and convict Herb Hamilton, constituted an unlawful act which served to coerce, intimidate, threaten and interfere with Herb Hamilton on account of his having aided and encouraged the residents of Oxford House-Edmonds in the exercise or enjoyment of their constitutional and statutory rights, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

33. The acts of the City of Edmonds in trying to arrest and convict Mark Spence constituted an unlawful act which served to coerce, intimidate, threaten and interfere with Mark Spence on account of his having aided and encouraged the residents of Oxford House-Edmonds in the exercise or enjoyment of their constitutional and statutory rights, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

34. The acts of the Cities of Edmonds and Everett in trying to preclude the establishment of Oxford House-Edmonds and Hoyt Recovery House, and, in the case of Edmonds, to close down Oxford House-Edmonds and to dispossess and arrest its residents, constituted separate unlawful acts each of which served to coerce, intimidate, threaten and interfere with the residents of the houses in the exercise and enjoyment of their constitutional and statutory rights, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

35. The separate acts of the Cities of Edmonds and Everett in trying to preclude the establishment of Oxford House-Edmonds and Hoyt Recovery House, and, in the case of Edmonds, to close down Oxford House-Edmonds and to dispossess and arrest its residents, which served to coerce, intimidate, threaten and interfere with the residents of the houses, were made on account of those residents having exercised and enjoyed their constitutional and statutory rights, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

36. The acts of the Cities of Edmonds and Everett were separate attempts by these cities to make unavailable and deny housing to the residents of Oxford House-Edmonds and Hoyt Recovery House on the basis of these residents' disabilities, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States

Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

37. The acts of the Cities of Edmonds and Everett constituted separate failures by these cities to make reasonable accommodations in their ordinances, codes and rules for the disabled residents of Oxford House-Edmonds and Hoyt Recovery House, respectively, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

38. The zoning codes of the Cities of Edmonds and Everett, and Everett City Ordinance No. 1770-91, purport to require and/or permit action which would be a discriminatory housing practice in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

39. The zoning codes of the Cities of Edmonds and Everett, and Everett City Ordinance No. 1770-91, discriminate in favor of related persons against unrelated disabled persons, in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and the Washington state Constitution, Article 1, sections 3 and 12.

40. Everett City Ordinance No. 1770-91 constitutes an unconstitutional pre-emption of federal legislation, namely, the Fair Housing Act, as amended, 42 U.S.C.

§ 3601 *et seq.*, and the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-4a, and is therefore invalid.

IV.

RELIEF

WHEREFORE, defendants Oxford House, Inc., Herb Hamilton, Oxford House-Edmonds and Hoyt Recovery House request that the court grant the following relief:

41. Dismiss plaintiff's complaint.

42. Declare that:

42.1. The Everett Community Development Code, the Everett Zoning Code and Everett City Ordinance No. 1770-91 are invalid, facially and/or as applied, under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, the Fair Housing Act of 1968, as amended, 42 U.S.C. § 3615, and Article 1, sections 3 and 12, of the Washington state Constitution.

42.2. Everett City Ordinance No. 1770-91 constitutes an unconstitutional pre-emption of federal legislation, namely, the Fair Housing Act, as amended, 42 U.S.C. § 3601 *et seq.*, and the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-4a, and is therefore invalid;

42.3. The acts of the cities of Edmonds and Everett, as set forth above, violated the Equal Protection Clause of the Fourteenth Amendment, the Fair Housing Act, 42 U.S.C. § 3601 *et seq.*, and Article 1, sections 3 and 12, of the Washington state Constitution.

43. Grant injunctive relief under the Fair Housing Act, 42 U.S.C. § 3613(c)(1), and under 42 U.S.C. § 1983:

43.1. Prohibiting the City of Edmonds and the City of Everett from enforcing their respective single-family zone occupancy limits against the residents of Oxford House-Edmonds and Hoyt Recovery House, respectively;

43.2. Prohibiting the City of Everett from enforcing its Ordinance No. 1770-91 in a way which would prevent more than 8 disabled persons from residing at Hoyt Recovery House;

43.3. Requiring the City of Everett and the City of Everett to consider and grant any and all permits as if Oxford House-Edmonds and Hoyt Recovery House, respectively, were related families occupying single family homes;

43.4. Prohibiting the City of Edmonds or the City of Everett from withholding city services on the ground that either Oxford House-Edmonds or Hoyt Recovery House is not a related family.

43.5. Prohibiting the City of Everett and the City of Everett from mandating any housing safety requirements for Oxford House-Edmonds and Hoyt Recovery House, respectively, above those required for a related family occupying a single family home.

43.6. Prohibiting any agents of the City of Edmonds or the City of Everett from harassing, citing, arresting, indicting, prosecuting or convicting any resident of Oxford House-Edmonds or Hoyt Recovery House for violations of plaintiffs' zoning codes or Everett City

Ordinance No. 1770-91 during the pendency of this litigation.

44. Award actual damages to Defendants under 42 U.S.C. § 1983 for harms suffered due to Plaintiffs' violations of the Equal Protection Clause of the Fourteenth Amendment, in an amount to be determined at trial.

45. Award actual and punitive damages to Defendants under the Fair Housing Act, 42 U.S.C. § 3613(c)(1) for Plaintiffs' violations of that Act, as amended, in an amount to be determined at trial.

46. Grant Defendants attorneys' fees and costs pursuant to the Fair Housing Act, 42 U.S.C. § 3613(c)(2), and 42 U.S.C. § 1988.

47. Such other relief as may be deemed lawful and equitable by this Court.

DATED this 19th day of August, 1991.

RIDDELL, WILLIAMS, BULLITT &
WALKINSHAW

By /s/ Robert I. Heller
*Robert I. Heller
WSBA No. 14375
Scott Schrum
WSBA No. 19726

Attorneys for Defendants Oxford
House, Inc. and Herb Hamilton

*Counsel of record

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
SEATTLE

UNITED STATES OF AMERICA,)	
Plaintiff,)	
vs.	)	No. C91-1273
	)	COMPLAINT
CITY OF EDMONDS,)	
WASHINGTON,)	
a Municipal Corporation,)	
Defendant.)	

The United States of America alleges:

1. This action is brought by the United States to enforce the provisions of the Fair Housing Act of 1968, as amended by the Fair Housing Amendments Act of 1988, 42 U.S.C. §§3601-3619.

2. This court has jurisdiction over this action under 28 U.S.C. §1345 and 42 U.S.C. §3614(a) and (b)(1)(A).

3. The defendant City of Edmonds is a municipality organized under the laws of the State of Washington, and is located in Snohomish County, Washington, within the Western District of Washington.

4. The City of Edmonds exercises zoning authority over land within its boundaries and, pursuant to that authority, has enacted and enforces zoning regulations set forth in the Edmonds Community Development Code ("ECDC").

5. Oxford House, Inc., is a non-profit, tax-exempt, Delaware corporation with its principal place of business

in Virginia. Oxford House, Inc., assists in establishing self-governed, self-supported residences for persons recovering from drug and/or alcohol addiction.

6. Oxford House Edmonds is an unincorporated association operating under a charter issued by Oxford House, Inc., and is comprised of the residents of the property located at 8704 216th Street, S.W., within the City of Edmonds, Washington. Oxford House Edmonds uses this property, pursuant to the charter issued to it by Oxford House, Inc., as a group home for approximately 12 recovering alcoholics and drug addicts.

7. The residents of Oxford House Edmonds are individuals recovering from alcohol and drug addiction and are handicapped within the meaning of 42 U.S.C. §3602(h) and its implementing regulation found at 24 C.F.R. §100.201 (1989).

8. Oxford House Edmonds leases the property at 8704 216th Street, S.W., from Herb Hamilton of 902 12th Place North, Edmonds, Washington, 98020.

9. The property at 8704 216th Street, S.W., is located within an area zoned RS (single-family residential) under the ECDC and is a dwelling within the meaning of 42 U.S.C. §3602(b).

10. Under the ECDC, the City of Edmonds permits single-family dwelling units in RS zones.

11. Under the ECDC, the City of Edmonds defines, in pertinent part, "family" to mean two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage.

12. Thus, City of Edmonds has, through the ECDC, made it unlawful for more than five unrelated persons to live together in a residence located in an RS zone.

13. The City of Edmonds, by and through its agents, has notified Oxford House Edmonds that its use of 8704 216th Street, S.W., described in paragraph 6, above, violates the ECDC by contravening the prohibition on more than five, unrelated persons residing together in a dwelling in an RS zone, and that the City of Edmonds intends to enforce the ECDC against Oxford House Edmonds.

14. The City of Edmonds, by and through its agents, has issued criminal citations to Mark Spence, Regional Representative, Oxford House, Inc., Herb Hamilton, and one or more residents of Oxford House Edmonds, for violating the ECDC by causing more than five unrelated individuals to reside together at 8704 216th Street, S.W.

15. While the use of the property at 8704 216th Street, S.W., as a residence for approximately 12 recovering alcoholics and drug addicts does not satisfy the ECDC's definition of a use allowed in an RS zone, the persons who live in the group home maintain a single housekeeping unit, eat their meals and socialize together, and otherwise function in a manner similar to a traditional family.

16. Notwithstanding the fact that the ECDC's definition of family is not satisfied, the ability of Oxford House Edmonds to use the property at 8704 216th Street, S.W., for the purposes described above in paragraph 6, is reasonable and necessary to allow persons with handicaps an equal opportunity to use and enjoy residential dwellings. The City of Edmonds would be reasonably

able to accommodate this use of the property in the RS zone without financial or administrative burden on the City of Edmonds. Such an accommodation would require no fundamental alteration of the City of Edmonds's zoning scheme.

17. On 8 August 1990, Oxford House Edmonds and Oxford House, Inc., filed with the Secretary of the Department of Housing and Urban Development ("HUD") a complaint of housing discrimination against the City of Edmonds and its Mayor, Larry S. Naughten, pursuant to 42 U.S.C. §3610, alleging discrimination on the basis of handicap in violation of the Fair Housing Act, 42 U.S.C. §3601-3619.

18. On 24 August 1990, Herb Hamilton filed with the Secretary of HUD a complaint of housing discrimination against the City of Edmonds and its Mayor, Larry S. Naughten, pursuant to 42 U.S.C. §3610, alleging discrimination on the basis of handicap in violation of the Fair Housing Act, 42 U.S.C. §3601-3619.

19. 29 April 1991, the General Counsel of HUD, noting that the complaints raised significant issues involving the legality of a local zoning ordinance, referred these matters to the Attorney General pursuant to Sections 810(e)(2) and 810(g)(2)(C) of the Fair Housing Act.

20. The Attorney General is authorized by 42 U.S.C. §3614(a) and (b)(1)(A) to bring this action upon receipt of the referral by the Secretary of HUD described in paragraph 21, above.

21. The actions of the City of Edmonds referred to in paragraphs 10 through 15, above, constitute a refusal by the City of Edmonds to make reasonable accommodations in its zoning rules, policies, and practices when such accommodations may be necessary to afford Oxford House Edmonds an equal opportunity to use and enjoy the dwelling at 8704 216th Street, S.W. This refusal violates 42 U.S.C. §3604(f)(3)(B)

22. Persons who have been the victims of the City of Edmonds's discriminatory practices are aggrieved persons within the meaning of 42 U.S.C. §3602(i), and have been denied their right to equal opportunity in housing and may have suffered other actual damages in the form of economic loss and emotional distress as a result of the defendant's conduct.

WHEREFORE, the United States prays that the court enter an ORDER:

1. Declaring that the actions of the City of Edmonds described in paragraphs 10 through 15, above, constitute a violation of the Fair Housing Act;

2. Enjoining the defendant, its agents, employees, and successors, and all other persons in active concert or participation with any of them, from interfering with the continued operation of Oxford House Edmonds, located at 8704 216th Street, S.W., Edmonds, Washington, including further prosecution of citations issued in connection with the operation of Oxford House Edmonds;

3. Requiring such action by the defendant as may be necessary to restore all persons aggrieved by the defendant's discriminatory housing practice to the position

they would have occupied but for the defendant's discriminatory conduct;

4. Awarding such damages as would fully compensate each person aggrieved by the defendant's discriminatory housing practices for his or her injuries occasioned by the denial of his or her right to equal housing opportunity, and for economic loss and emotional distress caused by the defendant's discriminatory conduct, pursuant to 42 U.S.C. §3614(d)(1)(B); and

5. Assessing a civil penalty against defendants in an amount of money authorized by 42 U.S.C. §3614(d)(1)(C) in order to vindicate the public interest.

The United States further prays for such additional relief as the interests of justice may require.

Respectfully submitted,

WILLIAM P. BARR
Acting Attorney General

By:

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General

/s/ Paul F. Hancock
PAUL F. HANCOCK
Chief, Housing and Civil
Enforcement Section

JOAN A. MAGAGNA

/s/ Howard R. Griffin
 HOWARD R. GRIFFIN
 Attorneys
 Housing and Civil Enforcement
 Section
 Civil Rights Division
 U.S. Department of Justice
 P.O. Box 65998
 Washington, D.C. 20035-5998
 (202) 514-4741

MIKE McKAY
 United States Attorney

/s/ Susan L. Barnes
 SUSAN L. BARNES
 Assistant United States
 Attorney

The Honorable William L. Dwyer
 UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

CITY OF EDMONDS,	)	NO. C 91-215 WD
et al.,)	
Plaintiffs,	)	PLAINTIFF'S FIRST SET
	)	OF INTERROGATORIES
v.	)	AND REQUESTS FOR
WASHINGTON STATE	)	PRODUCTION TO
BUILDING CODE	)	DEFENDANTS OXFORD
COUNCIL, STATE OF	)	HOUSE, INC., OXFORD
WASHINGTON, et al.,	)	HOUSE-EDMONDS AND
Defendants.	)	HOYT
	)	NO. C 91-1273 WD
UNITED STATES OF)	
AMERICA,)	
Plaintiff,)	
v.)	
CITY OF EDMONDS,)	
Defendant.)	

TO: Oxford House, Inc., Oxford House-Edmonds
 and Hoyt

AND TO: Robert I. Heller, their attorneys of record

IN ACCORDANCE with F.R.C.P. 26, 33 and 34, you
 will please answer the following interrogatories sep-
 arately and fully, under oath, and produce for inspection
 and copying by plaintiffs, City of Edmonds and the City
 of Everett, the following designated documents and
 things in the offices of attorneys for said plaintiffs, Ogden

Murphy Wallace, 2100 Westlake Center Tower, 1601 Fifth Avenue, Seattle, Washington 98101-1686 within thirty days of the date of service of these interrogatories and requests for production upon you.

These interrogatories and requests for production are to be treated as continuing. If information is not available within the time limits of the Civil Rules, you must answer each interrogatory and request for production as fully as possible within the time limit and furnish additional information when it becomes available.

If additional information is discovered between the time of making these answers and the time of trial, these interrogatories and requests for production are directed to that information. If such information is not furnished, the undersigned will move at the time of trial to exclude from evidence any information requested and not furnished.

NOTE: The information sought in these interrogatories and requests for production is intended to include any and all information and witnesses known to defendants, their agents, investigators or attorneys.

DEFINITIONS:

Document. As used herein, the word "document" shall mean the original or any copy of any book pamphlet, periodical, letter, memorandum, telegram, report, record, study, handwritten note, map, drawing, working paper, bill, receipt, personal diary, chart, paper, graph, index, tape, data sheet or data processing card, or any other written, recorded, transcribed, punched, taped,

filmed, photographic or graphic matter, however produced or reproduced, to which you now have or at any time have had access.

Identify or Identity. As uses herein, "identify" or "identity" when used in reference to an individual person means to state his full name and present address, his present or last-known position and business affiliation, and his position and affiliation at the time in question. "Identify" or "identity," when used in reference to a document, means to state the date and author, type of document (e.g., letter, memorandum, telegram, chart, etc.) or some other means of identifying it, and its present location or custodian. If any such document was in your possession, but is no longer in your possession or subject to your control, explain the disposition of the document.

INTERROGATORY NO. 1: Prior to leasing the current locations of the Edmonds and Everett houses, were any inquiries or investigations conducted by anyone associated with Oxford House pertaining to purchasing or leasing any facility.

ANSWER: No.

INTERROGATORY NO. 2: If your answer to the preceding interrogatory is in the affirmative, please identify by name, address, title, and telephone number each and every person who participated in any way in each said inquiry or investigation; identify each document pertaining in any way to said inquiry or investigation; and identify by address each and every location considered for leasing by the defendants.

ANSWER:

INTERROGATORY NO. 3: Are there any policies or established practices by anyone or any entity associated with Oxford House for selecting locations for residential facilities. If so, please identify each and every document pertaining in any way to such policies and practices; if there are any such policies or practices that are not written, please describe those in detail.

ANSWER: Yes. These policies are contained in the following two publications: 1) Oxford House, Inc., *Oxford House Manual*. 2) J. Paul Molloy, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction: A Technical Assistance Manual for Implementation of the Group Recovery Homes Provision or the Anti-Drug Abuse Act of 1988*, Office of Treatment improvement, United States Department of Health and Human Services, Public Health Service, Alcohol, Drug Abuse, and Mental Health Administration.

The Oxford House Manual is attached as Appendix C to the Molloy technical assistance manual.

REQUEST FOR PRODUCTION NO. 1: Please produce a copy of each and every document pertaining in any way to your answers to the preceding two interrogatories.

RESPONSE: At present, Defendants have only one copy of the technical assistance manual (and the Oxford House Manual, which is reprinted in the technical assistance manual). Defendants will make this copy available for review or copying at a mutually convenient time and place.

INTERROGATORY NO. 4: Identify each and every person, document and other resource you used in selecting your locations for Edmonds and Everett houses.

ANSWER:

Edmonds: Seattle Times, July 6, 1990.

Everett: Ken Westphal sought out Mark Spence.

REQUEST FOR PRODUCTION NO. 2: Please produce a copy of each and every document pertaining in any way to your answer to the preceding interrogatory.

RESPONSE: Defendant has no copy of the July 6, 1990 Seattle Times, but submits a copy of this newspaper is available in the Seattle Public Library, 1000 Fourth Avenue, Seattle.

INTERROGATORY NO. 5: Did you take into consideration the zoning category of the area in which the current houses are located as part of your selection process? If so, please identify each and every document pertaining to zoning that you reviewed and identify by name, address, title and telephone number of each and every person with whom zoning was discussed.

ANSWER: No.

INTERROGATORY NO. 6: Identify by name, current address, and current telephone number, each and every resident, past and present, of your Edmonds and Hoyt facilities.

ANSWER: Objection. This interrogatory is overbroad and not reasonably calculated to lead to the discovery of admissible evidence. Subject to and without waiving this

objection, Defendants state they will produce the names of the current residents and the house telephone numbers under a mutually acceptable confidentiality agreement, or under a protective order.

INTERROGATORY NO. 7: How many individuals have left each residence. Identify each resident who has left the facility by name, current address, and telephone number and state the reason each left.

ANSWER: Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 8: Have any of the facility's residents, or former residents, been arrested or convicted on any drug or alcohol related offense during the last two years? If so, identify each individual involved, the date of said arrest or conviction, the county where the arrest or conviction took place, and the date of each arrest or conviction.

ANSWER: Objection. This interrogatory is overbroad and not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 9: Identify each and every other Oxford House facility that has been established in King or Snohomish County, Washington by national Oxford House or any associated entity or person. As to each, please state if it is still in existence, identify the location, and if it failed, please state the reason.

ANSWER: Objection. This interrogatory is not reasonably calculated to lead to the discovery of admissible evidence.

INTERROGATORY NO. 10: Since the date the facilities were established, have the residents of either Oxford House Edmonds, or Oxford House Hoyt been given any training or information regarding Oxford House's recovery program? If so, please identify each individual involved in such instruction or training; identify each and every written material provided the residents; identify the dates of training or instruction.

ANSWER: Oxford House, Inc. has no "recovery program." Mark Spence lived with residents of Oxford House-Edmonds from approximately July 16, 1990 to the beginning of September, 1990. He instructed the charter residents in Oxford House-Edmonds in the procedures of the Oxford House Manual.

Mark Spence visited with the residents of Oxford House-Hoyt on approximately a daily basis from approximately August, 1990 to September, 1990, to instruct them in the procedures of the Oxford House Manual.

REQUEST FOR PRODUCTION NO. 3: Please produce a copy of each and every document identified in the answer to the preceding interrogatory.

RESPONSE: See Defendant's response to Request No. 1, above.

INTERROGATORY NO. 11: With respect to the decision to lease the two current locations for Oxford House-Edmonds and Oxford House Hoyt, please indicate who specifically was involved in making the decision, and explain all efforts undertaken in attempting to lease a residence.

ANSWER: Mark Spence.

With regards to Oxford-Edmonds, Mr. Spence located the house now leased through the real estate ads of the Seattle Times. It was the first house he inquired about.

With regards to Oxford House-Hoyt, Mr. Spence was approached by Ken Westphal. Mr. Westphal owned an existing home in which alcoholics in recovery resided. These residents already rented rooms from Mr. Westphal and later secured a lease from him.

INTERROGATORY NO. 12: Did any entity or person associated with Oxford House make any effort to determine the crime rate or drug trafficking incidents in the areas in which the Edmonds and Oxford House Hoyt facilities were located? If so, please identify each and every person involved in such efforts; identify each and every document which pertains in any way to such efforts; and describe in detail the extent of each and every effort.

ANSWER: Yes. Mark Spence investigated the neighborhood of the house, and was satisfied that it was a good, primarily residential, neighborhood. He and Herb Hamilton discussed that the crime rate in that neighborhood was very low. Mr. Spence believed that, from his experience, this neighborhood would have no or almost no drug trafficking.

REQUEST FOR PRODUCTION NO. 4: Please produce a true and accurate copy of each and every document identified in your answer to the preceding interrogatory.

RESPONSE: No such documents were identified.

INTERROGATORY NO. 13: Please identify each and every person by name, address, title and telephone number who you believe has knowledge pertaining to the claims or defenses alleged in this action. With respect to each person identified, please state the substance of their knowledge concerning this action.

ANSWER: At Oxford House Inc., 9312 Colesville Road, Silver Spring, MD 20901, (301) 587-2916:

1. Steve Polin, Director of Community Affairs, Oxford House: Mr. Polin has general knowledge of the efforts to rent the houses and the subsequent H.U.D. investigation and litigation.
2. Mark Spence, National Representative, Oxford House, Inc.
3. J. Paul Molloy, founder of Oxford House, Inc. and its current President. Mr. Molloy has limited general knowledge of the efforts to rent the houses and the subsequent H.U.D. investigation and litigation.
4. Charles Van Der Burgh, Treasurer, Oxford House, Inc. Mr. Van Der Burgh has limited general knowledge of the efforts to rent the houses and the subsequent H.U.D. investigation and litigation.

Herb Hamilton, landlord, Oxford House-Edmonds. 902 12th Place North, Edmonds, WA 98020, (206) 775-6206. Music teacher, self-employed.

Residents, Oxford House-Edmonds and Hoyt Recovery House.

REQUEST FOR PRODUCTION NO. 5: Please produce a true and accurate copy of each and every document (including any video or audio tapes and computer related data sources) that pertain in any way to the claims or defenses alleged in this action.

RESPONSE: Objection. This Request is vague and overbroad. Subject to and without waiving this objection, defendants state that they believe the investigative report authored by Mr. Tim Robison of H.U.D. may be relevant. Plaintiffs may obtain this document as easily as defendants.

REQUEST FOR PRODUCTION NO. 6: Please produce a copy of each and every lease that pertains in any way to the lease of locations Oxford House Edmonds and Oxford House Hoyt.

RESPONSE: A copy of this lease will be made available for copying or review at a mutually convenient time and place.

DATED this 20th day of November, 1991.

OGDEN MURPHY WALLACE

By: /s/ Phillip C. Raymond
WSBA #12998
Attorneys for Plaintiffs

ANSWERS AND OBJECTIONS SUBMITTED this 1st day of January, 1992. The undersigned attorney has read and foregoing answers and responses to these discovery requests, and they comply with CR 26(g).

**RIDDELL, WILLIAMS, BULLITT
& WALKINSHAW**

By: /s/ Robert I. Heller
Robert I. Heller
 WSBA #14375
 Attorneys for Defendants

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

_____, being first duly sworn upon oath, deposes and states as follows:

That _____ is _____ of defendant(s) in the above-entitled action, has read the foregoing "First Set of Interrogatories and Requests for Production of Plaintiffs to Defendants and Answers Thereto," knows the contents thereof and believes the same to be true.

SIGNED AND SWORN TO before me on _____, by

(Seal or Stamp)

Notary Public in and for the State
of Washington, residing at _____
My appointment expires _____

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS, et al.,	)	NO. C91-215WD
Plaintiffs,)	
v.	)	CITY OF
	)	EDMONDS' FIRST
UNITED STATES DEPARTMENT	)	REQUESTS FOR
OF HOUSING AND URBAN	)	ADMISSION TO
DEVELOPMENT, et al.,	)	UNITED STATES
Defendants,	)	DEPARTMENT OF
	)	HOUSING AND
	)	URBAN
	)	DEVELOPMENT
UNITED STATES OF AMERICA,)	
Plaintiff,	)	NO. C91-1273WD
v.)	
CITY OF EDMONDS,)	
Defendant.)	

TO: UNITED STATES DEPARTMENT OF HOUSING
AND URBAN DEVELOPMENT; and

TO: HOWARD R. GRIFFIN, its Attorney;

IN ACCORDANCE WITH Fed. R. Civ. P. 26 and 36, will you please admit or deny in writing the following requests for admission within thirty (30) days of the date of service of these requests upon you to attorneys for plaintiff City of Edmonds, Ogden Murphy Wallace, 2100 Westlake Center Tower, 1601 Fifth Avenue, Seattle, Washington 98101-1686. Failure to respond within the allotted time period will result in the requests being deemed admitted.

REQUEST FOR ADMISSION NO. 1: ADMIT OR DENY: The report prepared by the U.S. Department of Housing and Urban Development, Timothy M. Robison, Investigator, with respect to Case No. 10-90-0308-1, does not find any evidence of an intent to discriminate by the City of Edmonds, its City Council, or other officers, agents and employees, against the disabled in the adoption or application of the Edmonds Community Development Code.

ANSWER: Deny. The United States notes that the Department of Housing and Urban Development no longer is a defendant in these actions.

REQUEST FOR ADMISSION NO. 2: ADMIT OR DENY: Plaintiff United States of America has no evidence of an intent to discriminate against the disabled by the City of Edmonds, its City Council, or other offices, agents and employees in the adoption or amendment of the Edmonds Community Development Code.

ANSWER: Deny. The United States notes that the Department of Housing and Urban Development no longer is a defendant in these actions.

REQUEST FOR ADMISSION NO. 3: ADMIT OR DENY: Plaintiff United States of America has no evidence of an intent to discriminate against the disabled by the City of Edmonds, its City Council, or other officers, agents and employees in the application and enforcement of the Edmonds Community Development Code prior to the establishment of Oxford House-Edmonds.

ANSWER: Admit. The United States notes that the Department of Housing and Urban Development no longer is a defendant in these actions.

REQUEST FOR ADMISSION NO. 4: ADMIT OR DENY: Plaintiff United States of America has no evidence of an intent to discriminate against the disabled by the City of Edmonds, its City Council, or other officers, agents and employees in the application and enforcement of the Edmonds Community Development Code against and with respect to the Oxford House-Edmonds.

ANSWER: Deny. The United States notes that the Department of Housing and Urban Development no longer is a defendant in these actions.

REQUEST FOR ADMISSION NO. 5: ADMIT OR DENY: Plaintiff United States of America's allegation of discrimination against the disabled on the part of defendant City of Edmonds arises solely from the wording of the Edmonds Community Development Code and its definition of "family" which limits density in the single family zone as it has been applied to Oxford House-Edmonds and its disabled residents.

ANSWER: Deny. The United States notes that the Department of Housing and Urban Development no longer is a defendant in these actions.

DATED this 16th day of March, 1992.

OGDEN MURPHY WALLACE

By: /s/ W. Scott Snyder
W. Scott Snyder
 WSBA #12835
 Attorneys for Plaintiff
 City of Edmonds

ANSWERS AND OBJECTIONS SUBMITTED this 10th day of April, 1992. The undersigned attorney has read the foregoing answers and responses to these discovery requests, and they comply with Fed. R. Civ. P. 26 and 36. I

declare under penalty of perjury that the foregoing is true and correct. Executed on this 10th day of April 1992.

By: /s/ Howard R. Griffin
Howard R. Griffin
 Attorneys for Defendant
 United States Department of
 Housing and Urban
 Development

State of _____)
) ss.
 County of _____)

_____, being first duly sworn upon oath, deposes and states as follows:

That (he, she) is the _____ of the defendant United States Department of Housing and Urban Development in the above-entitled action, has read the foregoing "First Request for Admission to United States Department of Housing and Urban Development," knows the contents thereof and believes the same to be true.

U.S. DEPARTMENT OF HOUSING
 AND URBAN DEVELOPMENT

By: /s/ _____
 Its: _____

SIGNED AND SWORN to before me on _____,
 1992, by _____.

/s/ _____
 NOTARY PUBLIC
 My commission expires: _____

Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS, et al.,)	
Plaintiffs,)	
v.	)	NO. C91-215WD
WASHINGTON STATE BUILDING)	
CODE COUNCIL, et al.,)	
Defendants.)	
<hr/>		
UNITED STATES OF AMERICA,	)	NO. C91-1273WD
Plaintiff,)	
v.	)	<u>DECLARATION</u>
CITY OF EDMONDS,	)	<u>OF MARK A.</u>
Defendant.	)	<u>SPENCE</u>
<hr/>		

DECLARATION

VIRGINIA BEACH, VIRGINIA

MARK A. SPENCE hereby declares as follows:

1. I am the National Representative of Oxford House, Inc., located in Silver Spring, Maryland. I have worked in that capacity for about the past two years.
2. My job entails establishing Oxford Houses, which are group homes for recovering alcoholics and drug addicts, around the United States. In the past two years I have established about 20 Oxford Houses in 15 states.

3. To establish an Oxford House I locate a suitable house and rent it. Considerations of suitability include the size of the house (at least 4-6 bedrooms because an Oxford House cannot function with less than 6 residents), the proximity to public transportation, and the character of the neighborhood. Oxford House, Inc., seeks to establish houses in nice neighborhoods, away from illicit drug activity and opportunities for drug and alcohol abuse, to minimize the likelihood of relapse by a resident.
4. Once I have rented a suitable house, I seek to recruit recovering alcoholics and drug addicts to live there. I do this by making presentations to rehabilitation and detoxification organizations in the community. Only gainfully employed alcoholics and drug addicts in recovery who need support housing are eligible for residence at an Oxford House.
5. The average rent per resident at Oxford Houses around the United States is about \$250.00. Oxford House, Inc., tries to keep the per-resident rent at about this level because its residents are most likely to be minimum-wage employees with limited financial means.
6. I established Oxford House Edmonds in July, 1990. I went to Edmonds and looked at three or four houses before selecting the one at 8704 216th Street, S.W., in Edmonds. I selected this house because it was near public transportation, had no apparent drug activity in the neighborhood, and was large enough to accommodate ten residents.
7. I established Oxford House Edmonds for 10 residents in part because of the economics of the situation. The house rented for \$1,600.00 per month, and I estimated

that an additional \$800.00 per month was needed to pay for utilities and house supplies. Ten residents pay \$240.00 per month would meet these expenses and be within the acceptable rental range. Also, the house could accommodate ten residents since it had six bedrooms, four of which could accommodate two persons each, and two of which were singles.

8. All of the residents of Oxford House Edmonds are members of a twelve-step recovery program and depend on each other's support as an essential part of their recovery. The residents come together as one unit to combat alcoholism and drug addiction.

9. The mutually supportive setting essential to the Oxford House approach could not be sustained with less than six residents. For example, with fewer than six, should one resident relapse and be expelled, the financial strain on the remaining residents would most likely cause the house to fail. Furthermore, at least six are needed to help ensure that two or more persons are always at the house and that no one is likely to be alone at the house at a time when support may be needed. The differing work schedules of residents makes achievement of this goal quite difficult with less than six residents.

/s/ Mark A. Spence
MARK A. SPENCE

Subscribed and sworn to before
me this 27th day of April, 1992.

/s/ Carolynn R. Ramsey Commissioned as Carolynn R. Burger
Notary

My commission expires: March 31, 1996

Hon. William L. Dwyer

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,)	
WASHINGTON, a municipal)	
corporation and CITY OF)	
EVERETT, WASHINGTON, a	)	No. C91-215 WD
municipal corporation,)	
Plaintiffs,	)	JOINT
v.	)	STIPULATIONS
	)	FOR PURPOSES OF
	)	DISPOSITIVE
UNITED STATES DEPARTMENT	)	MOTIONS
OF HOUSING AND URBAN)	
DEVELOPMENT, et al.,)	
Defendants.)	

UNITED STATES OF AMERICA,)	
Plaintiff,	)	NO. C91-1273WD
v.)	
)	
CITY OF EDMONDS,)	
Defendant.)	

1. Oxford House-Edmonds is an unincorporated association operating under a charter issued by Oxford House, Inc. and is comprised of the residents of a house at 8704 216th Street, S.W., Edmonds, Washington. Oxford House-Edmonds uses this house, pursuant to the charter issued to it by Oxford House, Inc., as a residence for approximately 10-12 recovering adult alcoholics and drug addicts.

2. Oxford House-Edmonds is democratically governed adhering to rules and approach developed by Oxford House, Inc. in the *Oxford House Manual*. These rules require any resident who uses alcohol or drugs to be expelled. The house is self-supporting. The residents maintain a house checking account to pay for common house expenses. Each resident is assessed an equal share of these expenses. Each week, a resident must pay into the house account his share of the expenses. Failure to pay one's share will lead to expulsion from the house. In exigent circumstances, the house may "carry," for one to two weeks, a resident who cannot pay his share.

3. The residents of Oxford House-Edmonds live together as a single housekeeping unit and interact with each other, providing the mutual emotional support that is fundamental to the Oxford House approach to addiction recovery.

4. The residents of Oxford House-Edmonds are recovering alcoholics and drug addicts and are handicapped persons within the meaning of 42 U.S.C. §§ 3602(h) and 3604(f).

5. Oxford House-Edmonds leases the house at 8704 216th Street, S.W., from Herb Hamilton of 902 12th Place North, Edmonds, Washington, 98020.

6. Oxford House-Edmonds is located within an area zoned RS (single-family residential) under the Edmonds Community Development Code ("ECDC") and is a dwelling within the meaning of 42 U.S.C. § 3602(b).

7. The City of Edmonds limits occupancy of residential structures in single-family zones to a "family"

consisting of any number of persons related by adoption, marriage or genetics, or five or fewer unrelated persons. The City of Edmonds contends that this is a density restriction.

8. Because its members are not a "family" within the meaning of the ECDC, use of the house at 8704 216th Street, S.W., Edmonds, Washington, by Oxford House-Edmonds as a residence for 10-12 unrelated individuals described in ¶ 4, *supra*, violates the ECDC and exposes Oxford House Edmonds, its members, and Herb Hamilton to criminal liability.

9. The experience of Oxford House, Inc. has shown that the Oxford House approach requires approximately 8 to 12 residents in order to function effectively in terms of financial self-sufficiency and the achievement of a supportive environment for recovery from alcoholism and drug abuse. Based upon that national experience, Oxford House-Edmonds cannot viably operate at its current location in the single-family zone in Edmonds, Washington, and at the same time comply with the limit of 5 or fewer unrelated persons.

10. The City of Edmonds, in July and August of 1990, issued criminal citations to Herb Hamilton and one resident of Oxford House-Edmonds for violation of the ECDC's prohibition described above.

11. The City of Edmonds, by and through its agents, has notified Oxford House-Edmonds that it intends to enforce the ECDC against Oxford House-Edmonds, but it has also agreed voluntarily to refrain from any enforcement action until the resolution of this litigation. Contacts between the City of Edmonds and the representatives and

residents of Oxford House-Edmonds were limited to the following:

a. Letter from Duane Bowman, Assistant Planner, to Mark Spence, representative of Oxford House, Inc., notifying Mr. Spence that Oxford House-Edmonds' occupancy of the house at 8704 - 216th St. S.W. by more than five unrelated adults violated the single-family zone density restriction and definition of family.

b. An inspection of the premises lasting about fifteen (15) minutes by John Bissell, Code Enforcement Officer, with the permission and attendance of Mr. Spence.

c. Filing of misdemeanor charges in Edmonds Municipal Court against Mr. Spence, Herb Hamilton and a John Doe, resident. Service of charges and notification of withdrawal of the charges was accomplished by mail.

All actions taken were within the scope of the official duties of the City administrators. There is no evidence of any intent to harass the residents of Oxford House-Edmonds, nor of any action, other than the limited contacts detailed above, which might constitute harassment.

Since initial complaints by neighborhood residents, contacts between neighborhood residents and City officials have been limited to inquiries regarding the progress of the lawsuit instituted by the City. No other complaints have been received regarding any specific activity at the residence since the initial complaints.

12. Prior to the adoption of a new zoning ordinance in 1964, the City utilized a definition of family which did

not distinguish between relatives and other individual residents. The definition read as follows:

FAMILY: One or more persons occupying a dwelling unit and living as a single, nonprofit housekeeping unit.

Ordinance No. 789, Exhibit A. On October 20, 1964, following extensive hearings before the City's planning commission, the Edmonds City Council adopted a new zoning Ordinance 1074. In the ordinance, "family" was defined:

FAMILY: One or more persons related by blood, marriage, adoption or a group of not more than six persons (excluding servants) not related by blood or marriage, living together as a single housekeeping unit in a dwelling unit.

Ordinance 1074, Exhibit B. The only guide to the City Council's legislative purpose are the legislative findings which form a preface to the ordinance. During the 1970s, the definition was modified, dropping references to servants and including references to wards of the court. Code section 12.12.070, Exhibit C. In 1980, the City adopted a new comprehensive zoning ordinance which adopted the current definition. While there were extensive public hearings and a consultant's report, the definition of "family" was not discussed. The only guide to the Edmonds City Council's intent are the generalized findings contained in Ordinance No. 1074 adopting the 1964 revision of the Code. (Ordinances and minutes are attached.)

13. On January 22, 1991, the Edmonds City Council passed Ordinance No. 2820 deleting a requirement that

group homes for the disabled obtain conditional use permits to locate in multi-family zones of the City and permitting as outright permitted uses group homes for the disabled in multi-family and general commercial zones. Exhibit D is a true and accurate copy of the ordinance.

14. The impacts on City services and infrastructures from the residents of Oxford House-Edmonds are not qualitatively or quantitatively different than the impacts which would be created by an equally numerous group of related persons of the same age at the same location. According to the 1990 census, the average household in Edmonds contains 2.41 persons and the average family contains 2.88 persons, a reduction from the 2.64 persons per household and 3.07 persons per family recorded in the 1980 census.

15. Attached as Exhibit E is a true and correct copy of the City of Edmonds Community Development Code.

16. Attached as Exhibit F is a true and accurate copy of the City of Edmonds Zoning Map.

DATED this 28th day of April, 1992.

RIDDELL, WILLIAMS, BULLITT &
WALKINSHAW

By /s/ Robert I. Heller

*Robert I. Heller
WSBA No. 14375
Scott Schrum
WSBA No. 19726

Attorneys for Defendants Oxford
House, Inc., Oxford House-Edmonds
and Herb Hamilton

*Counsel of record

OGDEN, MURPHY, WALLACE

By /s/ W. Scott Snyder

W. Scott Snyder
WSBA No. 12835
Philip C. Raymond
WSBA No. 12998

Attorneys for City of Edmonds

UNITED STATES

Paul F. Hancock
Robert S. Berman
Howard R. Griffin

Attorneys, Housing and Civil
Enforcement Section, Civil Rights
Division, U.S. Department of Justice

The Honorable William L. Dwyer

UNITED STATES DISTRICT COURT IN AND FOR
THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS, et al.,	)	NO. C91-215WD
Plaintiffs,)	
vs.	)	AFFIDAVIT OF
	)	JEFFREY S. WILSON
	)	IN SUPPORT OF
WASHINGTON STATE	)	MOTION FOR
BUILDING CODE COUNCIL,	)	SUMMARY
et al.,	)	JUDGMENT
Defendants.)	

UNITED STATES OF)	
AMERICA,	)	NO. C91-1273WD
Plaintiff,)	
vs.)	
CITY OF EDMONDS,)	
Defendant.)	

STATE OF WASHINGTON)	
	)	ss.
COUNTY OF KING)	

COMES NOW Jeffrey S. Wilson and on his oath being duly sworn states and avers as follows:

1. I am currently employed as a [Current /s/ JSW] Planning Supervisor in the City of Edmonds and have served in that capacity for fourteen (14) months. [Prior to /s/ JSW] that time, I served as Planning Director for the City of Lake Stevens for fourteen (14) months. As part of

my employment with Lake Stevens, I worked for the City of Kirkland as a Planner for seven (7) years.

2. I have a Bachelors Degree from the University of Washington in urban planning, and graduated in 1982. I attended the University of Puget Sound Law School for one year. I am a member of the American Institute of Certified Planners.

3. The City of Edmonds [definition of family /s/ JSW] applies to all residential uses in the single family zone the occupancy limitation contained in ECDC 21.030.010. With the exception of uses designed to serve the single family use such as schools, churches and family daycare, all uses within a residential structure are limited in occupancy to a family as defined as no more than five (5) unrelated individuals.

4. Part of my duties include review of the City's current housing inventory. Based upon the database maintained by the Snohomish County Assessor, I have determined that there are two hundred fifty-eight (258) single family residences located in the City's multi-family zones. There are additional single family residences in the commercial zones of the City. These residences could be occupied by Oxford House as a matter of right.

5. During the fourteen (14) months that I have been employed by the City I have never observed nor have I been directed to take any action with respect to Oxford House. There is to my knowledge no administrative policy designed to harass, intimidate or otherwise interfere with the use of the property at 8704 - 216th Street S.W., Edmonds, Washington, by the resident recovering drug addicts and alcoholics. To my knowledge, neither I nor

any member of my department has had any contact with the residents of Oxford House, Edmonds, during the last fourteen (14) months.

6. Based on my training and experience, the definition of family employed by the City of Edmonds and its zoning code structure are typical of that found in communities throughout the state of Washington, and within limits of my experience, and other communities nationally.

Further affiant says not.

/s/ Jeffrey S. Wilson
Jeffrey S. Wilson

SUBSCRIBED AND SWORN TO before me this 28th day of April, 1992.

/s/ Rhonda J. March
NOTARY PUBLIC
My Commission expires:
June 16, 1993

[SEAL]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITY OF EDMONDS,)
WASHINGTON, a municipal)
corporation and CITY OF)
EVERETT, WASHINGTON, a)
municipal corporation,)
Plaintiffs,)

UNITED STATES DEPARTMENT) No. C91-215 WD
OF HOUSING AND URBAN)
DEVELOPMENT, et al.,)
Defendants.)

UNITED STATES OF AMERICA,)
Plaintiff,)
CITY OF EDMONDS,)
Defendant.)

CERTIFICATION OF J. PAUL MOLLOY

1. I J. Paul Molloy am a member, in good standing, of the Bar of the District of Columbia and serve as the Chief Executive Officer of Oxford House, Inc. I am a recovering alcoholic and was co-founder of Oxford House in 1975.
2. In 1981, I was a member of the Special Committee of the D.C. Bar on Alcoholism and Drug Addiction within the Bar which led to the establishment of the D.C. Bar Lawyer's Counselling Committee in 1982. I was a member of that Committee for eight years and former Co-Chairperson. I have been a witness before Congressional

Committees and Federal agencies on Employee Assistance Programs in the railroad industry and alcoholism and drug addiction in general.

3. Oxford House, Inc. is a Delaware non-profit corporation, recognized by the Internal Revenue Service as qualifying under section 501 (c) (3) of the Internal Revenue Code, and serves as the umbrella organization for a national network of 375 individual Oxford Houses including eleven in the State of Washington.

4. Individual Oxford Houses are autonomous but have a Charter from Oxford House, Inc. which contains the following three requirements:

The house must be self-run on a democratic basis;

The house must be financially self-supporting; and

Any resident who drinks alcohol or uses drugs must be immediately expelled.

5. Each Oxford House is rented – neither Oxford House, Inc. nor individual Oxford Houses own property for fear that such ownership would detract from the emphasis on recovery. The rental of each house is undertaken by the local group of individuals who will live in the house. The method of rental is designed to assure that the group of recovering individuals accept responsibility for paying bills.

6. The first Oxford House was founded in Silver Spring, Maryland in 1975 when a county-run halfway house closed because of a lack of funds. I was a resident of this

facility. This news absolutely panicked the remaining residents of the halfway house. We complained about our fate at Alcoholics Anonymous meetings. We complained about heartless bureaucrats throwing us out onto the streets at a time when we were making sincere attempts to change our lives. Members of Alcoholics Anonymous suggested to us that instead of whining about what was happening to us that we rent the house ourselves. With a loan from an Alcoholics Anonymous member, thirteen men took over the halfway house – six, including me, had been residents of the halfway house; seven other recovering individuals were recruited to form the first group.

7. The first Oxford House differed from its halfway house origins in three significant respects:

1. it was self-run; the halfway house was run by county employees – a house manager, a part-time counsellor, a cook and a supervisor;

2. it was self-supported by each resident paying an equal share of expenses; the halfway house charged various amounts based on a percentage of a resident's income and was extensively subsidized with county and state funds, and

3. residents of Oxford House could live in the house for as long as they wanted as long as they did not drink alcohol or use drugs and paid their equal share of expense; the halfway house had a residency time limit of six months.

8. Within a few weeks of its establishment, the first Oxford House incorporated in the State of Maryland as a not-for-profit corporation. The corporation was re-incorporated in the State of Delaware in October 1987.

9. The first Oxford House accumulated enough pooled resources at the end of six months to rent a second house in Northwest Washington, D.C. (March 1976). The second house was given a Charter to be an equal member of the Oxford House corporation. (By-laws provided from the beginning of the corporation that each house would have one vote in matters affecting the corporation.) That house together with the first Oxford House accumulated enough pooled resources to open a third house after another four months (August 1976). The pattern of expansion to accommodate additional applicants for residency in an Oxford House continued until 13 houses were in operation by the end of 1977 – approximately two years after the first Oxford House had started.

10. The number of Oxford Houses over the next ten years varied from a high of 14 to a low of 8 in 1985. After 1985 the number of houses in the Oxford House network grew to 12 in 1987; 18 in 1988; 33 in 1989 and 375 at present. The major reason for the growth in the number of houses is (1) the great demand for such houses, (2) the knowledge that the model could be easily duplicated outside the Washington, D.C. area, (3) the decision by Oxford House to expand, and (4) federal legislation designed to encourage all states to establish Oxford Houses.

11. In 1988, Oxford House was approached by members of Congress, Representative Edward Madigan (R-Ill.) in particular, when Congress was considering passage of the Anti-Drug Abuse Act. Specifically, Rep. Madigan wanted to know how Oxford House felt about receiving federal grant money for the establishment of Oxford Houses nationally. I brought the proposal to the next Oxford

House board meeting. At that time, the Oxford House board was comprised of the president from each existing Oxford House. The Board vehemently opposed the idea. They felt that government money means government control; which in turn mean rules, regulations and bureaucrats. They strongly felt that the receipt of government money would be the end of the self-support and self-government concept of Oxford House.

12. The sentiments of the Oxford House board was relayed to Rep. Madigan. A compromise was reached wherein each state was required to establish a \$100,000 revolving loan fund to make loans to start "self-run, self-supported recovery houses throughout the country. (See attached remarks of Congressman Madigan).

13. On November 18, 1988, President Ronald Reagan signed into law the Drug Abuse Act of 1988, P.L. 100-690. § 2036 of that law mandates each State to establish and implement a revolving loan fund to foster the establishment of self-run, self-supported recovery houses throughout the country. Specifically the law establishes criteria which defines a self-run, self-supported recovery house based on the Oxford House concept, traditions, and system of operations, to which applicants must adhere to in order to qualify for the loan.

14. Once the new law was enacted, Oxford House, Inc. established a central office to assist the various federal and state agencies interested in implementing the law.

15. Oxford House, Inc. entered a contract with the State of Washington to assist in the administration of the loan fund and to provide outreach and technical assistance to establish Oxford Houses within the state.

16. Pursuant to the contract with the State of Washington, Oxford House - Edmonds was established by Mark Spence, an employee of Oxford House, Inc. The house was a recipient of a start up loan from the state revolving loan fund.

I hereby certify under penalty of perjury that the foregoing is true and correct.

/s/ J. Paul Molloy
 J. Paul Molloy
 Chief Executive Officer
 Oxford House, Inc.
 9312 Colesville Road
 Silver Spring, MD 20901
 301-587-2916

Honorable William L. Dwyer

UNITED STATES DISTRICT COURT
 WESTERN DISTRICT OF WASHINGTON
 AT SEATTLE

CITY OF EDMONDS, et al.,

Plaintiffs,

v.

WASHINGTON STATE BUILDING

CODE COUNCIL, et al.,

Defendants.

UNITED STATES OF AMERICA,

Plaintiff,

v.

CITY OF EDMONDS,

Defendant.

NO. C91-215WD

NO. C91-1273WD

DECLARATION OF MARTHA AYLAS DUSENBERRY

I, Martha Aylas Dusenberry, make this declaration pursuant to the provisions of 28 U.S.C. 1746.

1. I am a Mathematical Statistician in the Housing and Civil Enforcement Section of the Civil Rights Division, United States Department of Justice and have been employed by the Division since April 1985. I have degrees in Mathematics and Mathematical Statistics from The American University, Washington, D.C. As a part of my responsibilities I maintain, retrieve, and analyze

census data in connection with the Department's enforcement activities.

2. I was requested to ascertain the total number of housing units, vacant housing units, owner occupied housing units and renter occupied housing units in the City of Edmonds (Shohomish County), Washington from the 1990 Census. These data were compiled by the United States Bureau of the Census during the 1990 Census and are reported in the 1990 Census of Population and Housing Summary Tape File 1A [STF1A]. The STF1A files also contain these data for single- and multi-family units. On June 25, 1992, I contacted the Washington State Data Center (State of Washington, Forecasting Division, Office of Financial Management, Olympia, Washington 98504-3113) and obtained these data for the City of Edmonds. Attached to this declaration is Profile 8 Housing Unit Structural Characteristics obtained from Washington State Data Center.

3. The attached report [at Items H41/42/43] indicates the following information for the City of Edmonds:

Total housing units	12,945	
Owner occupied	8,459	(65.4 percent)
Renter occupied	4,169	(32.2 percent)
Vacant	317	(2.5 percent)
Total single family housing units	8,550	
Renter occupied	967	(11.3 percent)
Vacant	148	(1.7 percent)

In addition, the 1990 Census indicates the total population for the City of Edmonds was 30,744 persons.

Pursuant to 28 U.S.C. 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 25th day of June 1992.

/s/ Martha Aylas Dusenberry
MARTHA AYLAS DUSENBERRY

'1990 CENSUS OF POPULATION AND HOUSING BY PLACE, SMOMOMISH COUNTY'
 PROFILE 8 - HOUSING UNIT STRUCTURAL CHARACTERISTICS
 PLACE: Edmonds city

07/05/91

STATE: WASHINGTON

COUNTY: 53861 PLACE: 8345 SUMLEVEL: 155

M29/43. LIMITS AND VALUE BY LIMITS IN STRUCTURE (UNIVERSE: OWNER-OCCUPIED HOUSING UNITS)				M30. VACANCY STATUS (UNIVERSE: VACANT HOUSING UNITS)	
	UNITS	AGGREGATE VALUE	AVERAGE VALUE		
SINGLE FAMILY	7,435	\$1,401,452,000	\$188,494	SPECIFIED VACANT FOR RENT	132
1, DETACHED	7,322	\$1,387,367,000	\$189,479	SPECIFIED VACANT FOR SALE ONLY	47
1, ATTACHED	113	\$14,035,000	\$124,646	ALL OTHER VACANTS	138
MULTI FAMILY	884	\$116,149,000	\$131,390	M38. RENT ASKED	
2	58	\$10,755,000	\$185,431	(UNIVERSE: SPECIFIED VACANT - FOR - RENT HOUSING UNITS)	
3 OR MORE	826	\$105,394,000	\$127,596	AGGREGATE RENT ASKED	\$74,302
MOBILE HOME OR				AVERAGE RENT ASKED	\$563
TRAILER	88	\$1,257,500	\$14,290		
OTHER	52	\$8,527,500	\$163,990	M31. PRICE ASKED	
				(UNIVERSE: SPECIFIED VACANT - FOR - SALE HOUSING UNITS)	
TOTAL	8,459	\$1,527,386,000	\$180,563	AGGREGATE PRICE ASKED	\$9,117,500
				AVERAGE PRICE ASKED	\$193,989

M41/42/43 UNITS IN STRUCTURE (UNIVERSE: HOUSING UNITS)

	TOTAL		VACANT		OCCUPIED		OWNER OCCUPIED		RENTER OCCUPIED	
	UNITS	PCT	UNITS	PCT	UNITS	PCT	UNITS	PCT	UNITS	PCT
SINGLE FAMILY	8,550	66.0%	148	66.7%	8,402	66.5%	7,435	87.9%	967	23.2%
1, DETACHED	8,352	66.5	142	44.8	8,210	65.0	7,322	86.6	888	21.3
1, ATTACHED	198	1.5	6	1.9	192	1.5	113	1.3	79	1.9
MULTI FAMILY	4,165	32.2	162	51.1	4,003	31.7	884	10.5	3,119	74.8
2	265	2.0	14	4.4	251	2.0	58	0.7	193	4.6
3 OR 4	615	4.8	30	9.5	585	4.6	128	1.5	457	11.0
5 TO 9	674	5.2	30	9.5	644	5.1	151	1.8	493	11.8
10 TO 19	1,122	8.7	38	12.0	1,084	8.6	367	4.1	737	17.7
20 TO 49	1,385	10.7	43	13.6	1,342	10.6	198	2.3	1,144	27.4
50 OR MORE	104	0.8	7	2.2	97	0.8	2	0.0	95	2.3
MOBILE HOME OR TRAILER	125	1.0	2	0.6	123	1.0	88	1.0	35	0.8
OTHER	105	0.8	5	1.6	100	0.8	52	0.6	48	1.2
TOTAL	12,945	100.0%	317	100.0%	12,628	100.0%	8,459	100.0%	4,169	100.0%

M43/44. AGGREGATE AND AVERAGE NUMBER OF PERSONS BY TENURE BY UNITS IN STRUCTURE
(UNIVERSE: PERSONS IN OCCUPIED HOUSING UNITS)

	OCCUPIED HOUSING UNITS:		OWNER OCCUPIED HOUSING UNITS:		RENTER OCCUPIED HOUSING UNITS:	
	AGGREGATE PERSONS	AVERAGE PERSONS	AGGREGATE PERSONS	AVERAGE PERSONS	AGGREGATE PERSONS	AVERAGE PERSONS
SINGLE FAMILY	22,796	2.71	20,027	2.69	2,769	2.86
1, DETACHED	22,372	2.72	19,770	2.70	2,602	2.93
1, ATTACHED	424	2.21	257	2.27	167	2.11
MULTI FAMILY	7,239	1.81	1,474	1.67	5,765	1.85
2	573	2.28	145	2.50	428	2.22
3 OR 4	1,146	1.96	233	1.82	913	2.00
5 TO 9	1,123	1.74	239	1.58	884	1.79
10 TO 19	1,929	1.78	554	1.60	1,375	1.87
20 TO 49	2,338	1.74	301	1.52	2,037	1.78
50 OR MORE	130	1.34	2	1.00	128	1.35
MOBILE HOME OR TRAILER	231	1.88	160	1.82	71	2.03
OTHER	181	1.81	99	1.90	82	1.71
TOTAL	30,447	2.41	21,760	2.57	8,687	2.08

100TH CONGRESS
2d Session

REPORT
100-711

HOUSE OF REPRESENTATIVES
FAIR HOUSING AMENDMENTS ACT OF 1988

JUNE 17, 1988. - Committed to the Committee
of the Whole House on the State of the Union and
ordered to be printed

MR. EDWARDS of California, from the Committee
on the Judiciary, submitted the following

REPORT

together with

ADDITIONAL AND DISSENTING VIEWS

[To accompany H.R. 1158]

[Including cost estimate of the
Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 1158) to amend title VIII of the Act commonly called the Civil Rights Act of 1968, to revise the procedures for the enforcement of fair housing, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment is as follows:

Strike out all after the enacting clause and insert in lieu thereof the following:

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Housing Amendments Act of 1988".

SEC. 2. SHORT TITLE FOR 1968 ACT.

The Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90-284, approved April 11, 1968) is amended by inserting after the comma at the end of the enacting clause, the following: "That this Act may be cited as the 'Civil Rights Act of 1968'."

SEC. 3. REFERENCES TO 1968 ACT.

Except as otherwise expressly provided, whenever in this Act an amendment or repeal is expressed in terms of an amendment to, or repeal of, a section or provision, the reference shall be considered to be made to a section or other provision of the Act entitled "An Act to prescribe penalties for certain acts of violence or intimidation, and for other purposes" (Public Law 90-284, approved April 11, 1968).

* * *

SEC. 9. CONFORMING AMENDMENT TO TITLE IX.

Section 901 is amended by inserting ", handicap (as such term is defined in section 802 of this Act), familial status (as such term is defined in section 802 of this Act)," after "sex" each place it appears.

SEC. 10. TECHNICAL AMENDMENT RELATING TO CIVIL ACTION.

Section 818 (as so redesignated by section 8 of this Act) is amended by striking out the last sentence thereof.

SEC. 11. CONFORMING AMENDMENTS TO TITLE 28, UNITED STATES CODE.

(a) JURISDICTION. - Section 2342 of title 28, United States Code, is amended -

(1) by striking out "and" at the end of paragraph (4);

(2) by striking out the period at the end of paragraph (5) and inserting "; and" in lieu thereof; and

(3) by inserting after paragraph (5) but before the matter beginning "Jurisdiction is invoked" the following:

"(6) all final orders of an administrative law judge under section 812 of the Fair Housing Act."

(b) DEFINITION. - Section 2341(3) of title 28, United States Code, is amended -

(1) by striking out "and" at the end of subparagraph (B);

(2) by striking out the period at the end of subparagraph (C) and inserting "; and" in lieu thereof; and

(3) by adding at the end the following:

"(D) the administrative law judge, when the order is under section 812 of the Fair Housing Act."

SEC. 12. DISCLAIMER OF PREEMPTIVE EFFECT ON OTHER ACTS.

Nothing in the Fair Housing Act as amended by this Act limits any right, procedure, or remedy available under the Constitution or any other Act of the Congress not so amended.

SEC. 13. EFFECTIVE DATE AND INITIAL RULEMAKING.

(a) **EFFECTIVE DATE.** – This Act and the amendments made by this Act shall take effect on the 180th day beginning after the date of the enactment of this Act.

(b) **INITIAL RULEMAKING.** – In consultation with other appropriate Federal agencies, the Secretary shall, not later than the 180th day after the date of the enactment of this Act, issue rules to implement title VIII as amended by this Act. The Secretary shall give public notice and opportunity for comment with respect to such rules.

SEC. 14. SEPARABILITY OF PROVISIONS.

If any provision of this Act or the application thereof to any person or circumstances is held invalid, the remainder of the act and the application of the provision to other persons not similarly situated or to other circumstances shall not be affected thereby.

EXPLANATION OF THE AMENDMENT IN THE NATURE OF A SUBSTITUTE

The amendment in the nature of a substitute adopted by the Committee differs from the introduced bill primarily in the following respects: clarifies that the handicap provisions do not require that a dwelling be provided to any person whose tenancy poses a direct threat to the health or safety of others; excludes current illegal users or addicts of controlled substances from protection as handicapped persons; allows persons with handicaps to make reasonable modifications, at their expense, to existing premises to afford them full enjoyment of the premises; requires new multifamily dwelling of 4 or more units to

be designed and constructed to allow access and use by handicapped persons; clarifies that the prohibition of discrimination against families with children does not apply to housing for older persons; clarifies that appraisers may consider relevant and nondiscriminatory factors; removes reference to hazard, mortgage and title insurance; eliminates the requirement that the Department of Housing and Urban Development (HUD) provide financial assistance to public and private agencies, and to assist the poor; allows HUD to seek prompt judicial action with notice to the Attorney General; allows states and localities 40 months to retain "substantially equivalent" status and allows HUD to grant an additional 8 months in extraordinary circumstances; places Administrative Law Judges (ALJs) in the Department of Justice; creates deadlines for action by HUD and ALJs of 100 days for investigations and reasonable cause determinations, 120 days for hearings to commence after a charge has been issued, and 60 days for the ALJ to make findings of fact and conclusions of law; requires HUD to report annually the number of incidents in which the time lines were not met; requires that the Federal Rules of Evidence govern the presentation of evidence; allows ALJs to award actual damages, equitable relief, and to impose maximum civil penalties of \$10,000, 25,000 and 50,000; eliminates the ability of ALJs to award punitive damages; brings attorney's fee language in title VIII closer to the model used in other civil rights laws.

PURPOSE OF THE BILL AS AMENDED BY THE COMMITTEE

The purposes of H.R. 1158, as amended, are threefold. One is to fulfill the promise made to the American

people 20 years ago by the enactment of title VIII of the Civil Rights Act of 1968. That law proscribes housing practices that discriminate on account of race, color, national origin or religion,¹ but it fails to provide an effective enforcement system to make that promise a reality. This bill seeks to fill that void by creating an administrative enforcement system, which is subject to judicial review, and by removing barriers to the use of court enforcement by private litigants and the Department of Justice. Second, H.R. 1158 extends the principle of equal housing opportunity to handicapped persons. Third, the bill extends protections to families with children. Both handicapped persons and families with children, like the other classes protected by title VIII, have been the victims of unfair and discriminatory housing practices.

AMENDMENTS ADOPTED BY THE COMMITTEE

Clarifies language on new construction, families with children exemption, injunctive relief, removes reference to hazard insurance.

Clarifies that the handicap provisions of the bill do not require a dwelling to be made available to an individual whose tenancy would constitute a direct threat to the health or safety of others.

Excludes current illegal uses and addicts of controlled substances from the definition of handicapped persons.

¹ And, as amended in 1974, on account of sex. Public Law 93-383.

Moves Administrative Law Judges from the Department of Housing and Urban Development to the Department of Justice.

Allows appraisers to take into consideration relevant and non-discriminatory factors when making appraisals.

Increases time from 30 to 40 months for substantially equivalent agencies to retain status. Allows Secretary discretion to extend period to 48 months in exceptional circumstances.

Clarifies rights of parties in administrative proceedings.

* * *

Secretary has no place else to go. In those few cases where good will is absent, the exclusive reliance upon voluntary resolution is, in the words of former Secretary Carla Hills, and 'invitation to intransigence.'

Reform of the Fair Housing Act is a necessity that is acknowledged by all.²¹

The debate, then, is not whether to improve existing law, but rather, how to improve it.

ADMINISTRATIVE ENFORCEMENT

H.R. 1158 creates an administrative enforcement mechanism, so the federal government can and will take an active role in enforcing the law. HUD will continue to investigate complaints and will conciliate the conflict

²¹ Message from President Reagan transmitting the Proposed Fair Housing Amendments Act of 1983, July 12, 1983.

between the parties, who can also agree to arbitration. If conciliation fails and HUD determines that reasonable cause exists to believe that a discriminatory housing practice has occurred or is about to occur, then HUD can bring the case to a hearing before an Administrative Law Judge. Because HUD can continue to enforce the law if the conciliation is unsuccessful, there is a real incentive for both parties to conciliate and resolve the complaint in the early stages.

Administrative proceedings have been used for many years in other federal agencies²² and are economical and efficient. Many states now use administrative proceedings to adjudicate housing discrimination complaints.²³ Continuing current law, states and localities with "substantially equivalent" fair housing laws will still be able to handle cases in their own administrative proceedings.

The bill strengthens the private enforcement section by expanding the statute of limitations, removing the limitation on punitive damages, and brings attorney's fee language in title VIII closer to the model used in other civil rights laws. The bill allows the Attorney General to intervene in private cases of general public importance, continues the Justice Department's pattern or practice jurisdiction, and, at the suggestion of the Administration,

²² Over 29 agencies regularly use administrative law judges.

²³ At least 32 of 36 state agencies, and most local agencies, certified by HUD as substantially equivalent under existing law use administrative hearings to adjudicate fair housing complaints. Most of these agencies hold hearings before a fair housing board, civil rights commission, or similar body.

allows the Justice Department to seek substantial civil monetary penalties against violators.

COVERAGE OF HANDICAPPED PERSONS

H.R. 1158 includes handicapped persons as a protected class. Handicapped persons have been protected from some forms of discrimination since Congress enacted the Rehabilitation Act of 1973,²⁴ and the bill uses the same definitions and concepts from that well-established law. In the 1980 Fair Housing bill, Congress also included protections for individuals with handicaps.

Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice.

The Fair Housing Amendment Act, like Section 504 of the Rehabilitation Act of 1973, as amended,²⁵ is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

²⁴ U.S.C. 701 et seq.

²⁵ 29 U.S.C. 794.

For example, people who use wheelchairs have been denied the right to build simple ramps to provide access, or have been perceived as posing some threat to property maintenance.²⁶ People with visual and hearing impairments have been perceived as dangers because of erroneous beliefs about their abilities. People with mental retardation have been excluded because of stereotypes about their capacity to live safely and independently.²⁷ People with Acquired Immune Deficiency Syndrome (AIDS) and people who test positive for the AIDS virus have been evicted because of an erroneous belief that they pose a health risk to others.²⁸

All of these groups have experienced discrimination because of prejudice and aversion – because they make non-handicapped people uncomfortable. H.R. 1158 clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons. The right to be free from housing discrimination is essential to the goal of independent living.

²⁶ See, e.g., testimony of Sharon Mistler, 1986 Subcommittee hearings at 244, testimony of David Capozzi at 253.

²⁷ In *City of Cleburne v. Cleburne Living Center*, 473 U.S. 435 (1985), the Supreme Court held that there is no rational basis to exclude citizens with mental retardation from living in the community. In that case, the city's zoning board ruled that residents with mental retardation posed a variety of dangers which precluded them from safely living in a home in the community. The Court examined each alleged danger, and concluded that each was based on a stereotype, and not on actual fact.

²⁸ See, e.g., New York City Commission on Human Rights, Report on Discrimination Against People with AIDS, August 1987.

Because persons with mobility impairments need to be able to get into and around a dwelling unit (or else they are in effect excluded because of their handicap), the bill requires that in the future covered multifamily dwellings be accessible and adaptable. This means that the doors and hallways must be wide enough to accommodate wheelchairs, switches and other controls must be in convenient locations, most rooms and spaces must be on an accessible route, and disabled persons should be able to easily make additional accommodations if needed, such as installing grab bars in the bathroom, without major renovation or structural change.

These modest requirements will be incorporated into the design of new buildings, resulting in features which do not look unusual and will not add significant additional costs. The bill does not require the installation of elevators or "hospital-like" features, or the renovation of existing units.

COVERAGE OF FAMILIES WITH CHILDREN

H.R. 1158 also prohibits discrimination based on familial status (having children who are under 18). In many parts of the country families with children are refused housing despite their ability to pay for it. Although 16 states have recognized this problem and have proscribed this type of discrimination to a certain extent, many of these state laws are not effective.

Both the Congress and the courts have a long tradition of defining and protecting families as "perhaps the

most fundamental social institution of our society."²⁹ The Congress has consistently stressed the importance of the family in numerous social welfare programs intended to support children and their parents.³⁰ In 1949, the federal government made a commitment to "provide a decent home and suitable living environment for every American family."³¹ Nearly 40 years after this commitment, however, discrimination against families with children prevents millions of American families from realizing this goal.

In the latest national survey of discrimination based on familial status, HUD found that 25 percent of all rental units did not allow children; 50 percent were subject to restrictive policies that limited the ability of families to live in those units; and almost 20 percent of families were living in homes they considered less desirable because of restrictive practices.³²

In another survey HUD found that 99 percent of respondents reported numerous problems related to housing discrimination against children. Of these respondents, 55 percent had searched for housing for over 9

²⁹ *Trimble v. Gordon*, 430 U.S. 763 (1977).

³⁰ See, e.g., Aid to Families with Dependent Children, 42 U.S.C. 601; Adoption Assistance and Child Welfare Act, 42 U.S.C. 670 et seq.

³¹ 42 U.S.C. 1441.

³² Marans, "Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey," Office of Policy Planning and Research, Department of Housing and Urban Development, 1980.

weeks; 47 percent reported living in substandard conditions; 22 percent had been forced to move; 39 percent lived in overcrowded conditions; and 19 percent said that family members had to live apart during the past year.³³

Sixteen states have some law prohibiting discrimination against families,³⁴ but these laws vary tremendously. Some states exempt all-adult (over 18 years old) housing communities,³⁵ and others allow families to be segregated within a complex.³⁶ and others exempt retirement communities with low entrance ages.³⁷ Nine states cover only rental and not sale housing.³⁸ Illinois and New Jersey protect only children under 14. New Jersey limits relief to no more than \$200 for the first offense and \$500 for each subsequent offense. Arizona relies on a criminal sanction for enforcement.

Even in states with laws, discrimination against families continues. In 1982 and 1983 the California Supreme Court found that the state anti-discrimination law protected families with children in both rental housing and

³³ Greene, "How Restrictive Rental Practices Affect Families With Children" Office of Policy Planning and Research, Department of Housing and Urban Development, 1980.

³⁴ Arizona, California, Connecticut, Delaware, Illinois, Maine, Massachusetts, Michigan, Minnesota, Montana, New Hampshire, New Jersey, New York, Rhode Island, Vermont, Virginia.

³⁵ e.g. Arizona, Rhode Island, Virginia.

³⁶ e.g. Maine, Massachusetts, Minnesota.

³⁷ e.g. New Hampshire (45), Michigan (50).

³⁸ Arizona, Connecticut, Delaware, Illinois, Maine, New Jersey, New York, Rhode Island, Vermont.

condominiums.³⁹ In 1984 the state legislature codified and clarified these decisions.⁴⁰ But even after enactment, discrimination against children continued in California. In 1983, a year after the court decision, a study of apartment complexes in Sacramento found that 40 percent engaged in differential and discriminatory treatment towards families.⁴¹ And in 1984, a survey in 11 major California cities found that 39 percent of landlords excluded or imposed restrictions on children.⁴²

Connecticut enacted its anti-discrimination law in 1981, but 5 years later, following state-wide hearings, the state concluded that "families with children are overtly and illegally discriminated against."⁴³ The Director of the

³⁹ *Marina Point Ltd. v. Wolfson*, 30 Cal.3d 721, 180 Cal. Rptr. 496, 640 P.2d 115 (1982) (rental housing). *O'Connor v. Village Green Owners Association*, 33 Cal.3d 790, 191 Cal.Rptr. 320, 662 P.2d 427 (1983) (condominiums).

Before the court made these decisions, a 1979 study found that staggering numbers of rental units, 71 percent in Los Angeles, 70 percent in San Jose, 65 percent in San Diego, 53 percent in Fresno, did not rent to families with children in California. Ashford, "The Extent and Effects of Discrimination Against Children in Rental Housing: A Study of Five California Cities," December 1979.

⁴⁰ California Civil Code §§ 51.2 and 51.3. This prohibits discrimination against families in virtually all housing

⁴¹ Human Rights/Fair Housing Commission of the City and County of Sacramento, "Discrimination Against Families With Children in the Sacramento Rental Market: Audit and Assessment," March 1983.

⁴² "Anti-children Bias Illegal But Common in L.A. Apartment," Los Angeles Times, part II, p. 1 (March 4, 1985)

⁴³ Connecticut Commission on Human Right and Opportunities, "Housing Discrimination and Opportunities in the State of Connecticut" at 18, April 1986.

Illinois Department of Human Rights said that the majority of fair housing complaints in the state are based on exclusion of children.⁴⁴

A 1986 study detailed the problem in New Jersey, which had prohibited discrimination against children in 1898. In Middlesex County, 75 percent of 1200 families seeking assistance in locating rental housing reported discrimination against them because of their children. The Monmouth County Board of Social Services Housing Unit estimated a 50 percent rate of discrimination against families they assisted. The New Jersey Tenants Organization, with 80,000 member households, reported at least 25 percent of households with children have had a problem with discrimination.⁴⁵

In states without laws prohibiting discrimination, the situation is equally serious. In Des Moines, Iowa, a survey found that 48 percent of the landlords did not permit children and only a few of the landlords rented to families without any restrictions.⁴⁶ In Dallas, Texas, studies showed that 52 percent of the units within the central city prohibit children and an additional 12 percent have restrictions as to the number and age of children.⁴⁷ In the

⁴⁴ 1987 Subcommittee hearings at 655.

⁴⁵ "Adults Only, Discrimination Against Children in Rental Housing, Housing Coalition of Middlesex County, 1986.

⁴⁶ Burke, "A Report on Discrimination against Children in Des Moines Rental Housing," prepared for the Des Moines Community Housing Resource Board, September 1985.

⁴⁷ Greene, "An evaluation of the Exclusion of Children from Apartments in Dallas Texas," J.G. & Associates, Inc. 1978.

Dallas suburb of Irving, only 13 of 40 apartment complexes built between 1983-85 accept families with children.⁴⁸ In Alexandria, Virginia, only 9 of the rental units accept families without restriction.⁴⁹

Discrimination against families often has a racially discriminatory effect, because minority households are more likely to have children.⁵⁰ For example, in California, 69 percent of Hispanic families and 62 percent of black families have children, compared with 51 percent of white families.⁵¹ Because minority households tend to be larger and exclusion of children often has a racially discriminatory effect, two federal courts of appeal have held that adults-only housing may state a claim of racial discrimination under title VIII.⁵²

In addition, because predominantly white neighborhoods are more likely to have restrictive policies, racial segregation is exacerbated by the exclusion of children. For example, the national survey by HUD found that units in predominantly white neighborhoods restricted children at a rate of 28.9 percent compared with 17.5

⁴⁸ "Apartment Hunting Complex with Kids," Irving Daily News, at 1 (October 25, 1985).

⁴⁹ "Landlords 'No Children' Policies Frustrate Parents Seeking Housing", Wall Street Journal, section 2, p. 35 (October 16, 1985).

⁵⁰ See testimony of James Morales, 1987 Subcommittee hearings at 390.

⁵¹ U.S. Department of Commerce, Bureau of the Census, "General Population Characteristics," part 6-Cal. 52(1981).

⁵² *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984); *Halet v. Wend Investment Co.*, 672 F.2d 1305 (9th Cir. 1982).

percent in predominantly black neighborhoods, and also found that restrictions are greater in recently built units.⁵³

The bill specifically exempts housing for older persons. The Committee recognizes that some older Americans have chosen to live together with fellow senior citizens in retirement-type communities. The Committee appreciates the interest and expectation these individuals have in living in environments tailored to their specific needs.

SECTION-BY-SECTION ANALYSIS

SHORT TITLES AND REFERENCES

Section 1 provides that the short title of this Act will be the Fair Housing Amendments Act of 1988.

Section 2 provides that the short title of the 1968 Act (which is being amended) will be the Civil Rights Act of 1968. This simply establishes in the law itself the short title which is often used when referring to the 1968 Act.

Section 3 states that all references in the bill are to the 1968 Civil Rights Act unless otherwise specified.

Section 4 provides that the short title of title VIII of the 1968 Act shall be the Fair Housing Act. Again, this simply establishes in the law the title normally used when referring to title VIII.

⁵³ Marans, fn. 32, *supra*, at 34, 44.

AMENDMENTS TO DEFINITIONS

Section 5(a) broadens the definition of discriminatory housing practice to include prohibitions against coercion, intimidation, threats or interference under Section 817.

Section 5(b) amends the definition section. Adds new definitions of handicap, aggrieved person, complainant, familiar status, conciliation, conciliation agreement, respondent, and prevailing party.

Handicap. Provides a definition of handicap to be used under this Act. This language is substantially similar to the definition under the primary federal law prohibiting discrimination against the handicapped, the Rehabilitation Act of 1973.⁵⁴ The Committee intends that the definition be interpreted consistent with regulations clarifying the meaning of the similar provision found in Section 504 of the Rehabilitation Act.⁵⁵

⁵⁴ Definitions at 29 U.S.C. 706.

⁵⁵ See, e.g., 45 CFR § 84.3; 45 CFR part 84, App. A., subpart A. As the regulations note, the definition of handicap does not include a list of specific diseases and conditions that constitute physical or mental impairments because of the difficulty of ensuring the comprehensiveness of any such list and because some conditions covered under the definition of handicap may not even have been discovered or prevalent in the population at the time of passage of legislation. For example, AIDS and infection with the Human Immunodeficiency Virus (HIV) are covered under this Act, although such conditions were not even discovered when Section 504 was passed in 1973. See, e.g., *Local 1812, American Federation of Government Employees v. U.S. Department of State*, 662 F.Supp. 50, 54 (D.D.C. 1987), *Ray v. School District of DeSoto County*, 666 F.Supp. 1524 (M.D. Fla. 1987).

The definition adopted by the Committee makes it clear that current illegal users of or addicts to controlled substances, as defined by the Controlled Substances Act,⁵⁶ are not considered to be handicapped persons under the Fair Housing Act. This amendment is intended to exclude current abusers and current addicts of illegal drugs from protection under this Act. The definition of handicap is not intended to be used to condone or protect illegal activity.

This exclusion does not eliminate protection for individuals who take drugs defined in the Controlled Substances Act for a medical condition under the care of, or by prescription from, a physician. Use of a medically prescribed drug clearly does not constitute illegal use of a controlled substance.

Similarly, individuals who have a record of drug use or addiction but who do not currently use illegal drugs would continue to be protected if they fell under the definition of handicap. The Committee does not intend to exclude individuals who have recovered from an addiction or are participating in a treatment program or a self-help group such as Narcotics Anonymous. Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery.

⁵⁶ 21 U.S.C. 802.

Individuals who have been perceived as being a drug user or an addict are covered under the definition of handicap if they can demonstrate that they are being regarded as having an impairment and that they are not currently using an illegal drug.

The exception for current illegal drug users does not affect their coverage in the Rehabilitation Act or other statutes. The World Health Organization and the American Psychiatric Association both classify substance abuse and drug dependence as a mental disorder, and most medical authorities agree that drug dependence is a disease.⁵⁷ Indeed, Congress has defined the term "handicap" in the Rehabilitation Act to include drug addiction and to require that federal employers as well as recipients of federal financial assistance recognize drug addiction as a handicap.⁵⁸

Aggrieved person. Provides a definition of aggrieved person to be used under this act. In *Gladstone Realtors v. Village of Bellwood*,⁵⁹ the Supreme Court affirmed that standing requirements for judicial and administrative review are identical under the VIII. In *Havens Realty Corp.*

⁵⁷ American Psychiatric Association, "Diagnostic and Statistical Manual of Mental Disorders," 3rd ed, 1980, pp. 163-179; World Health Organization, "International Classification of Diseases," 9th Rev., Clinical Modifications (ICD-9-CM) (1978), items 304 and 305; American Medical Association, Resolution 113 (1987), reprinted in U.S. Journal of Drug and Alcohol Dependence (July 1987).

⁵⁸ See, e.g., 43 Op. Att'y. Gen. (1977), *School Board of Nassau County v. Arline*, 107 S.Ct. 1123, 1130, n. 14 (1987).

⁵⁹ 441 U.S. 91 (1979).

v. Coleman,⁶⁰ the Court held that "testers" have standing to sue under title VIII, because Section 804(d) prohibits the representation "to any person because of race, color, religion, sex or national origin that any dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available."⁶¹ The bill adopts as its definition language similar to that contained in Section 810 of existing law, as modified to reaffirm the broad holdings of these cases.

Familial status. The Committee intends to cover by this definition a parent or other person having legal custody, or that individual's designee, domiciled with a child or children under age 18. The Committee does not intend this definition to include marital status.

Prevailing party. Provides a definition of prevailing party to be used under this Act. This term makes clear that the same definition of prevailing party as used in the Civil Rights Attorney's Fees Act⁶² is to be used in this Act.

ADDITIONAL DISCRIMINATORY HOUSING PRACTICES

Section 6(a) amends the list of discriminatory housing practices to prohibit discrimination on the basis of handicap. New subsection 804(f)(1) would make it unlawful to discriminate or to otherwise make unavailable or deny a dwelling to any buyer or renter because of a handicap of

⁶⁰ 455 U.S. 363 (1982).

⁶¹ 455 U.S. 363, 373, emphasis original.

⁶² 42 U.S.C. 1988.

that individual, someone associated with that individual, or of a resident or potential resident.

New subsection 804(f)(2) would similarly prohibit discrimination against the same persons in the terms, conditions, privileges, or provision of services or facilities. This provision is intended to prohibit special restrictive covenants or other terms or conditions, or denials of service because of an individual's handicap and which have the effect of excluding, for example, congregate living arrangements for persons with handicaps. It would guarantee, for example, that an individual could not be discriminatorily barred from access to recreation facilities, parking privileges, cleaning and janitorial services and other facilities, uses of premises, benefits and privileges made available to other tenants, residents, and owners. To the extent that terms, conditions, privileges, services or facilities operate to discriminate against a person because of a handicap, elimination of the discrimination would be required in order to comply with the requirements of this subsection.

The Committee intends these provisions to prohibit not only discrimination against the primary purchaser or named leasee, but also to prohibit denials of housing opportunities to applicants because they have children, parents, friends, spouses, roommates, patients, subtenants or other associates who have disabilities.

These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments

have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities.⁶³ This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices. The Act is intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community. Under H.R. 1158, land use and zoning cases are to be litigated in court by the Department of Justice. They would not go through the administrative process.

Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations

⁶³ See e.g., *City of Cleburne v. Cleburne Living Center*, 473 U.S. 435 (1985).

on health, safety and land-use in a manner which discriminates against people with disabilities.⁶⁴ Such discrimination often results from false or over-protective assumptions about the needs of handicapped people, as well as unfounded fears of difficulties about the problems that their tenancies may pose. These and similar practices would be prohibited.

New subsection 804(f)(3) sets out specific requirements to augment the general prohibitions under (f)(1) and (2). These include provisions regarding reasonable modifications to existing premises, "reasonable accommodation" and accessibility features in new multifamily housing construction.

New Subsection 804(f)(3)(A) makes it illegal to refuse to permit tenants with disabilities to make reasonable modifications, at his or her own expense, of existing premises if the modification is necessary for those persons' full enjoyment of the premises. During the hearing process, the Committee learned of instances in which landlords have refused to let tenants with handicaps make minor changes to their apartments, such as the installation of a lever door knob for a person with an artificial hand, or the installation of grab bars in bathrooms, even if the tenant was willing to pay for the

⁶⁴ Id.

modification.⁶⁵ A landlord's refusal to allow such modifications operates, at worst, to deny housing to handicapped persons, and, at least, to deny them the opportunity to enjoy their premises safely and fully.

The Committee understands that the nature of individual handicaps, and therefore the potential need for environmental modifications, varies greatly. Therefore the term "full enjoyment" has been used here to assure that reasonable modifications required by individual tenants to assure that he or she could fully use the premises would be protected under this Act. For example, persons who have a hearing disability could install a flashing light in order to "see" that someone is ringing the doorbell. Elderly individuals with severe arthritis may need to replace the doorknobs with lever handles. A person in a wheelchair may need to install fold-back hinges in order to be able to go through a door or may need to build a ramp to enter the unit. Any modifications protected under this section must be reasonable and must be made at the expense of the individual with handicaps.

New Subsection 804(f)(3)(B) makes it illegal to refuse to make reasonable accommodation in rules, policies, practices, or services if necessary to permit a person with handicaps equal opportunity to use and enjoy a dwelling. The concept of "reasonable accommodation" has a long history in regulations and case law dealing with discrimination on the basis of handicap.⁶⁶ A discriminatory rule, policy, practice or service is not

⁶⁵ See e.g., Testimony of Bonnie Milstein, 1986 Subcommittee hearings at 102.

⁶⁶ See, *Southeastern Community College v. Davis*, 442 U.S. 397 (1979); 45 CFR § 84.12.

defensible simply because that is the manner in which such rule or practice has traditionally been constituted. This section would require that changes be made to such traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling.

New Subsection 804(f)(3)(C) places modest accessibility requirements on "covered multifamily dwellings" designed and built for first occupancy 30 months after enactment. Covered multifamily dwellings are defined in Subsection 804(f)(5) to mean buildings of 4 or more units with elevators, or ground floor units in other, non-elevator buildings. The Committee does not intend this bill to require the installation of elevators.

The Committee understand that housing discrimination against handicapped persons is not limited to blatant, intentional acts of discrimination. Acts that have the effect of causing discrimination can be just as devastating as intentional discrimination. A person using a wheelchair is just as effectively excluded from the opportunity to live in a particular dwelling by the lack of access into a unit and by too narrow doorways as by a posted sign saying "No Handicapped People Allowed." In *Alexander v. Choate*,⁶⁷ the Supreme Court observed that discrimination on the basis of handicap is "most often the product, not of invidious animus, but rather of thoughtlessness and indifference - of benign neglect" and mentioned

⁶⁷ 469 U.S. 287 (1985).

"architectural barriers" as one factor that can have a discriminatory effect.⁶⁸

Accessibility requirements can vary across a wide range. A standard of total accessibility would require that every entrance, doorway, bathroom, parking space, and portion of buildings and grounds be accessible. Many designers and builders have interpreted the term "accessible" to mean this type of standard. The Committee does not intend to impose such a standard. Rather, the Committee intends to use a standard of "adaptable" design, a standard developed in recent years by the building industry and by advocates for handicapped individuals to provide usable housing for handicapped persons without necessarily being significantly different from conventional housing.⁶⁹ This subsection sets forth certain features of adaptive design to be incorporated in new multifamily housing construction.

The first requirement is that the public and common use portions of such dwellings be readily accessible to and usable by handicapped persons. This means that hallways, lounges, lobbies, passageways among and between buildings and other common areas and facilities not contain barriers to entrance and use by handicapped persons. This requires that one regular entrance to such areas be accessible to handicapped persons for the same purpose for which it is used by others. It does not require that all entrances be made accessible to handicapped

⁶⁸ 469 U.S. 297.

⁶⁹ See Barrier Free Environments, Inc., "Adaptable Housing," Office of Policy Development and Research, Department of Housing and Urban Development, 1988, at 7.

persons.⁷⁰ It also does not require that amenities, such as laundry rooms or public bathrooms, be installed. The intent of the language is that only if such amenities are provided, then they must be readily accessible to and usable by handicapped persons.

The second requirement is that passage doorways into and within all units be sufficiently wide to allow passage by handicapped persons in wheelchairs. This requirement is not intended to apply to doorways not designed to allow passage, such as into a linen closet, but would apply to a walk-in closet, since such a doorway is designed to allow passage. These slightly wider doors are not uncommon, and as they become increasingly uniform within the housing industry, the price can reasonably be expected to decrease as well.

The third requirement is that all premises contain four specified features of adaptive design. This requirement was refined during consideration by the Committee, to provide additional specificity for planners and builders, and was drafted in consultation with the American Institute of Architects and the National Association of Home Builders.

The first adaptable design feature is an accessible route. This means that persons in wheelchairs be able to

⁷⁰ The Committee understands that "readily accessible to and usable by" are terms of art used in other Federal statutes and regulations. See, e.g., Architectural Barriers Act of 1968, 42 U.S.C. 4151, et seq., and regulations under Section 504 of the Rehabilitation Act of 1973, 45 CFR §§ 84.1-15. The Committee intends that such term in this Act have the same meaning as in the others.

have physical access into and throughout the unit equal to persons not in wheelchairs. The second feature is that light switches, electrical outlets, thermostats and other environmental controls be provided in accessible locations, neither too high nor too low. This provision is not intended to increase the risk of danger to others or necessarily to require waist high controls.

The third feature is reinforcements in bathroom walls to allow the later installation of grab bars around the toilet, tub, shower stall and shower seat. This does not require that grab bars be installed in a new construction, but rather that reinforcements be installed to allow the easy later installation of grab bars at a tenant's option and expense. When reinforcements are installed as a part of new construction, there is no aesthetic change to the bathroom and it is of minimal expense. Having to add reinforcements later, however, can be a major structural undertaking with associated expense.

The fourth feature is that kitchens and bathrooms be usable such that an individual in a wheelchair can maneuver about the space. This provision is carefully worded to provide a living environment usable by all. Design of standard sized kitchens and bathrooms can be done in such a way as to assure usability by persons with disabilities without necessarily increasing the size of the space.⁷¹ The Committee intends that such space be usable by handicapped persons, but this does not necessarily

⁷¹ See e.g., Barrier Free Environments, Inc., "Adaptable Housing," Office of Policy Development and Research, Department of Housing and Urban Development, 1988.

require that a turning radius be provided in every situation. This provision also does not require that fixtures, cabinetry or plumbing be of such design as to be adjustable.

New Subsection 804(f)(4) was adopted during Committee consideration to assure designers of new multifamily housing that if they follow the American National Standard for buildings and facilities providing accessibility and usability for physically handicapped people, commonly cited as ANSI A117.1, then they will have met the adaptive design requirements. However, this section is not intended to require that designers follow this standard exclusively, for there may be other local or state standards with which compliance is required or there may be other creative methods of meeting these standards. But if designers do follow this standard, then they have satisfied the Act's requirements of adaptive design.

The Committee is sensitive to the possibility that certain natural terrain may pose unique building problems. For example, in areas which flood frequently, such as waterfronts or marshlands, housing may traditionally be built on stilts. The Committee does not intend to require that the accessibility requirements of this Act override the need to protect the physical integrity of multifamily housing that may be built on such sites.

The Committee believes that these provisions carefully facilitate the ability of tenants with handicaps to enjoy full use of their homes without imposing unreasonable requirements on homebuilders, landlords and non-handicapped tenants. The Committee believes that these basic features of adaptability are essential for equal

access and to avoid future de facto exclusion of persons with handicaps, as well as being easy to incorporate in housing design and construction. Compliance with these minimal standards will eliminate many of the barriers which discriminate against persons with disabilities in their attempts to obtain equal housing opportunities.

New Section 804(f)(6) ensures that State and local laws and regulations which impose stricter accessibility requirements than does this Act shall remain in force. Many States have enacted accessibility and equal opportunity requirements for persons with disabilities. It is the intent of the Committee that the Act simply establishes minimum standards for equal opportunity, and does not supplant or replace State or local laws which impose higher standards.

New Section 804(f)(7) was adopted during Committee consideration of the bill and states that it shall not be discrimination on the basis of handicap to deny a dwelling to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals. This provision was passed by the Committee as a substitute to an amendment which would have excluded from the definition of "handicap" under the Act "any current impairment that consists of alcoholism, drug abuse, or any infectious, contagious or communicable disease whether or not such disease causes a physical or mental impairment during the period of contagion, or any other impairment which would be a direct threat to the property, health or safety of others."

The Committee rejected the approach of excluding a category of individuals with disabilities from the protection of the Act. Instead, the Committee affirmed that all individuals with handicaps, with the exception of current illegal abusers or addicts of controlled substances, have access to the housing protections established by this Act. While the Committee does not foresee that the tenancy of any individual with handicaps would pose any risk, much less a significant risk, to the health or safety of others by the status of being handicapped, the Committee added this provision to allay the fears of those who believe that the non-discrimination provisions of this Act could force landlords and owners to rent or sell to individuals whose tenancies could pose such a risk.⁷²

In adopting this amendment, the Committee drew on case law developed under Section 504 of the Rehabilitation Act of 1973. Section 504, which governs programs and activities receiving federal financial assistance, provides that no "otherwise qualified handicapped individual" may be subjected to discrimination solely on the basis of his or her handicap. Handicapped individuals are "otherwise qualified" if, with reasonable accommodation, they can satisfy all the requirements for a position or

⁷² Following adoption of the substitute amendment, another amendment was offered that would have excluded from the definition of handicap "any current impairment that consists of an infectious, contagious or communicable disease whether or not such disease causes a physical or mental impairment during the period of contagion." The debate on this amendment primarily centered around people infected with HIV (the AIDS virus). The amendment was defeated.

services.⁷³ An individual is not otherwise qualified if, for example, he or she would pose a threat to the safety of others, unless such threat can be eliminated by reasonable accommodation.⁷⁴

The formulation of this amendment parallels the provision added to the Civil Rights Restoration Act of 1988⁷⁵ with regard to individuals with contagious diseases and infections⁷⁶ – a provision Congress added in order to codify the recent Supreme Court decision in *School Board of Nassau County v. Arline*.⁷⁷ In *Arline*, the Court held that "[a] person who poses a significant risk of communicating an infectious disease to others in the workplace will

⁷³ See *Southeastern Community College v. Davis*, 442 U.S. 397, 406 (1979); *Pushkin v. Regents of University of Colorado*, 658 F.2d 1372, 1385-1387 (10th Cir. 1981).

⁷⁴ See *School Board of Nassau County v. Arline*, 107 S.Ct. 1123, 1130-1131 (1987); *Strathie v. Department of Transportation*, 716 F.2d 227, 232-234 (3rd Cir. 1983).

The concept of reasonable accommodation is well established in regulations and case law. See fn. 66, *supra*. In regulations recently issued by the Department of Housing and Urban Development, the agency noted that the reasonable accommodation requirement applies to ensure usability of housing for tenants with disabilities 24 CFR § 8.24(b), 53 Fed. Reg. at 20239 (June 2, 1988). Although the Committee believes it extremely unlikely that the tenancy of an individual with handicaps would ever pose a direct threat to others, such that the reasonable accommodation requirement would be necessary to eliminate the threat, the requirement exists for those situations in which it might be necessary.

⁷⁵ Public Law 100-259, 102 Stat. 28 (March 22, 1988).

⁷⁶ See Section 9 of Public Law 100-259 amending Section 7(8) of the Rehabilitation Act of 1973, 29 U.S.C. 706.

⁷⁷ 107 S.Ct. 1123 (1987).

not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk."⁷⁸

While *Arline* dealt with employment in the context of Section 504, the Committee intends that same standard to apply in the context of housing under this Act. Thus, the direct threat requirement incorporates the *Arline* standard, and a dwelling need not be made available to an individual whose tenancy can be shown to constitute a direct threat and a significant risk of harm to the health or safety of others. If a reasonable accommodation could eliminate the risk, entities covered under this Act are required to engage in such accommodation pursuant to Section 6(f)(3) of the Act.

The provision adopted by the Committee specifically refers to a direct threat posed by an individual's tenancy. The purpose of this formulation is to require that the landlord or property owner establish that there is a nexus between the fact of the individual's tenancy and the asserted direct threat. Thus, under this provision, a court would need to evaluate whether a direct threat and a significant risk of harm existed in the context of the individual's tenancy.

Any claim that an individual's tenancy poses a direct threat and a substantial risk of harm must be established on the basis of a history of overt acts or current conduct.

⁷⁸ 107 S.Ct. at 1131, n. 16. While the amendment in the Civil Rights Restoration Act amended the definition of "individual with handicaps" in order to parallel a 1978 amendment added with regard to coverage of alcohol and drug users, Congress made clear that its purpose in adding the amendment was to codify the entire "otherwise qualified" standard of *Arline*.

Generalized assumption, subjective fears, and speculation are insufficient to prove the requisite direct threat to others.⁷⁹ In the case of a person with a mental illness, for example, there must be objective evidence from the person's prior behavior that the person has committed overt acts which caused harm or which directly threatened harm.

In practical terms, a landlord may not, for example, refuse to rent to an individual solely because the applicant uses a wheelchair, is mentally retarded or has a vision or hearing impairment. Similarly, if the landlord determines that the applicant has a history of a physical or mental illness, that fact alone is insufficient for the landlord to use in determining whether or not to rent to that individual. The landlord may ask the applicant for references to determine the applicant's eligibility for tenancy, as he does for other applicants. If the landlord determines, by objective evidence that is sufficiently recent as to be credible, and not from unsubstantiated inferences, that the applicant will pose a direct threat to the health or safety of others, the landlord may reject the applicant as a tenant. In assessing information, the landlord may not infer that a recent history of a physical or mental illness or disability, or treatment for such illnesses or disabilities, constitutes proof that an applicant will be unable to fulfill his or her tenancy obligations.

This provision is not intended to give landlords and owners the right to ask prospective tenants and buyers

⁷⁹ See *Arline*, 107 S.Ct. at 1130-1131; *Chalk v. U.S. District Court*, 840 F.2d 701 (9th Cir. 1988); *New York State Association for Retarded Children v. Carey*, 612 F.2d 644, 649-650 (2nd Cir. 1979).

blanket questions about the individuals' disabilities. Under Section 504 of the Rehabilitation Act, employers may not inquire, as part of pre-employment inquiries, whether an applicant is a handicapped person or as to the nature or severity of the handicap. Employers may only make pre-employment inquiries into an applicant's ability to perform job-related functions.⁸⁰ Similarly, under this provision, only an inquiry into a prospective tenant's ability to meet tenancy requirements would be justified. Thus, in assessing an application for tenancy, a landlord or owner may ask an individual the questions that he or she asks of all other applicants that relate directly to the tenancy (e.g., questions relating to rental history or a targeted inquiry as to whether the individual has engaged in acts that would pose a direct threat to the health or safety of other tenants), but may not ask blanket questions with regard to whether the individual has a disability. Nor may the landlord or owner ask the applicant or tenant questions which would require the applicant or tenant to waive his right to confidentiality concerning his medical condition or history. The only exception is that a landlord or owner may ask whether the individual is a current illegal abuser or addict of controlled substances.

Section 6(b) amends existing Section 806 and 804(c)-(e) to prohibit discrimination on the basis of handicap and amends existing section 806 and 804(a)-(e) to prohibit discrimination on the basis of familial status.

⁸⁰ See 45 CFR § 84.14 (1977).

Section 6(c) amends Section 805 to prohibit discrimination in residential real estate-related transactions. It defines residential real estate-related transaction to include making or purchasing of real estate related loans, or the selling, brokering, or appraising of residential real property.

Under amended Section 805, the provisions of the Act extend to the secondary mortgage market. The Committee does not intend that those purchasing mortgage loans be precluded from taking into consideration factors justified by business necessity (including requirements of Federal law) which relate to the financial security of the transaction or the protection against default or diminution in value of the security.

The provision prohibiting discrimination against families under Section 805(a), which deals with discrimination in the terms or conditions of financing, is not intended to restrict or prohibit the legitimate consideration of actual obligations incurred in caring for children (such as on-going day care expenses and child support obligations), just as the lender considers other obligations incurred by other persons, when evaluating the ability of a person to qualify for a mortgage.

This section also clarifies that appraisers may take into consideration relevant and nondiscriminatory factors when making appraisals. Thus, it is intended that the appraisal process not operate to discriminate on the basis of race, color, religion, national origin, sex, handicap or familial status.

Section 6(d) amends Section 807 to make additional exemptions relating to the familial status provisions.

These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

This section exempts from the familial status provisions any State or Federal program aimed at assisting the elderly.⁸¹ It also exempts housing for older persons.

The Committee intends that the housing for older persons exemption be limited to communities consisting of dwellings intended for older persons. Housing for older persons is defined in a two pronged test; in order to meet the definition, at least one prong must be satisfied.

The first prong has two parts; both must be fulfilled. First, 90 percent of the units must be occupied by at least one person 55 or older. The Committee recognizes that persons over 55 may have spouses, dependents or other individuals under 55 who live with them and provide emotional and economic support. Such persons would still be allowed to live in the unit without jeopardizing the exemption for the community, as long as at least 90 percent of the units are occupied by at least one person 55

⁸¹ See, e.g., Section 202 of the Housing Act of 1959, 12 U.S.C. 1701q.

or older. This requirement is not intended to substitute an average age of 55 for the community. The Committee also recognizes that there may be rare instances in which only persons under 55 may reside in a unit in the community, such as a nurse providing care for a resident. Thus, the Committee does not require all units to be occupied by at least one person over 55, only that most units, 90 percent, be occupied by such older persons.

The second part of the first prong requires significant facilities and services specifically designed to meet the physical or social needs of the older residents. As the President's Commission on Housing recently stated, "the frailties of old age need not result in institutionalization if accessible housing and adequate services are available."⁸² Earlier, the President's Task Force on Aging noted "the period of independence of older persons maybe extended and the quality of their lives enhanced through provision of limited supportive services in apartments and villages designed especially for their use."⁸³

Such facilities and services include congregate dining facilities, social and recreational programs, emergency and preventive health care or programs, continuing education, welfare, information and counseling, recreational, homemaker, outside maintenance and referral services, transportation to facilities access to social services, and

⁸² Report of the President's Commission on Housing, 1982, at 49.

⁸³ Report of the President's Task Force on Aging: Toward A Brighter Future for the Elderly, 1971, at 38.

services designed to encourage and assist recipients to use the services and facilities available to them.⁸⁴

In order to meet the specific physical needs of older persons, the community should be designed to meet the functional and safety needs of aging persons over time. While residents may be of generally good health when they enter a development, they are likely to experience a diminution of physical capacity as the years pass. This requires an environment which can accommodate the changing needs of such residents, and would typically include hand rails along steps and interior hallways to reduce the risk of falls, grab bars in bathrooms, routes that allow use of wheelchairs, canes and walkers, lever type doorknobs and single lever faucets.

The Committee does not intend that this listing of facilities and services be exclusive, or that a community is required to have all of the listed items. Rather, the list is to serve as an example for such communities. The Committee understands that most existing age-restricted retirement-type communities provide such facilities and services, and would meet the test for exemption. The Committee does not intend for this part to be met by the provision of minor amenities, such as putting a couch in a laundry room and labeling it a recreation center, or installing a ramp at the front entrance.

The second prong has a simple test: the community must be intended for and occupied solely by persons 62

⁸⁴ See also, Section 202(f) of the Housing Act of 1959, 12 U.S.C. 1701q, listing examples of facilities and services for elderly persons.

years of age or older. The Committee intends that all persons, without exception, permanently living in the community, be over 62. The Committee does not intend to exclude temporary visitors, such as children, grandchildren or other visitors under 62, or necessary resident employees such as medical staff or maintenance personnel.

Oxford House Manual

An Idea Based On a Sound System
For Recovering Alcoholics to Help Themselves

**HOUSING,
FELLOWSHIP,
SELF-RELIANCE
SELF-RESPECT,
FOR RECOVERING INDIVIDUALS**

Oxford House, Inc., is a non-profit corporation which will provide Charters, at a nominal charge, to recovering alcoholics who want to provide group housing for themselves.

* * *

The size, location and cost of a suitable house to begin an Oxford House depends more on what is available than any specific criteria. The charter members who are looking for a suitable house should make certain that any prospective house can be occupied without violating local zoning or health and safety laws. This does not mean that an Oxford House should not be considered simply as residential property. In practice Oxford House is no different from an ordinary family - except no one in an Oxford House drinks alcohol or takes mood changing drugs.

* * *

vacancy. Members listen to each member who has met or talked to the applicant. A vote should be taken on each applicant. If the applicant is rejected he or she should be told right after the meeting. If the applicant is accepted, and space is available, he or she should be informed as to

when to move in and given a copy of the manual so as to understand how Oxford House works. If the applicant is accepted, but no space is immediately available, he or she should be put on a waiting list and told his or her prospects of getting in. Whenever a waiting list gets long, a house should consider the feasibility of starting another house. Each new member should be told that the application he or she completed constitutes agreement to follow the rules of the House.

Meetings also include the wide range of decisions facing an Oxford House from purchases of wastebaskets to plans for opening a new House. The House meeting is the place to resolve any conflicts which arise from living together as a group. It is also a good place to pass on information about new AA meetings or up-coming AA related events. Staying sober and enjoying life is at the heart of Oxford House living.

Money

Oxford House is built on the principle of self-help. When it comes to money matters, this simply means that any House must operate from its rent receipts. There may be exceptions when a House is first getting started. After a few weeks or months, a new Oxford House should be able to pay all of its operating expenses out of its rental income.

Some expenses associated with an Oxford House are not controllable after a commitment has been made to begin a House. For example, the monthly rental payment will be a fixed amount. In addition, utilities (electric, gas or oil, basic telephone and often water) will for the most

part be fixed expenses. One area where expenses are controllable involves the purchase of food and supplies. All expenses, whether fixed or controllable, must be carefully watched so that any member at any time can know the exact financial condition of the House. Particular attention must be paid to the telephone expenses. Each member should pay for his or her own long distance calls. Usually the Comptroller is responsible to see that the members pay their share of the telephone bill promptly so that the House is not faced with an unwanted and unwarranted expense.

The President, the Treasurer, and Comptroller all have a responsibility for making certain that accurate records are maintained showing expenses and income of the House. Every Oxford House should have its own checking account and make certain to run all income and outgo through the checking account as the main control point for keeping track of money flow. The very first thing a new Oxford House does is to establish a checking account. At least three officers of the House should be authorized to sign checks with two signatures required on each check in order for it to be valid. Any local bank will

* * *

- alcohol or drug use
 - as soon as use is suspected call a special meeting
 - when a majority confirms use expulsion results
 - if drunk or high, member should leave immediately

- if passive, leave the next morning
- make no exceptions
- establish a readmission guideline of thirty days sobriety
- accept the fact that the House welfare is more important than any individual
- accept the fact that "tough love" stops relapses

OFFICERS

- House President
 - elected for six month term
 - must be resident of House
 - calls and leads weekly and special meetings
 - cannot succeed himself but can be elected to the same office after six months have elapsed
- House Treasurer
 - elected for six month term
 - must be resident of House
 - responsible for maintaining House financial records
 - keeps membership informed about financial condition
 - cannot succeed himself but can be elected to the same office after six months have elapsed

- House Secretary
 - elected for six month term
 - must be resident of House
 - responsible for recording minutes of House meetings
 - keeps pending applications for new memberships
 - sends thank you notes to contributors
 - cannot succeed himself but can be elected to the same office after six months have elapsed
- House Comptroller
 - elected for six month term
 - must be resident of House
 - collects rent
 - deals with day to day expenses
 - responsible to Treasurer
 - balances books with Treasurer prior to each meeting
 - cannot succeed himself but can be elected to same office after six months have elapsed

COMMUNITY RELATIONS

- Alcoholics Anonymous
 - individual members should attend may AA meetings

- Oxford House is not affiliated with AA but members of the House know that only active participation in AA offers assurance of continued sobriety
- let AA members know about Oxford House and how it is doing
- Neighbors
 - be a good neighbor
 - keep the outside of the House looking good
 - be considerate of where members park cars
 - get to know neighbors and be friendly
 - write thank you notes to those who give furniture and other things to the House

This Oxford System Checklist is simply a guideline used by one of the existing Houses. Your House may have better ideas and shorter or longer checklist. Use whatever helps to keep your Oxford House running smoothly so that all members have comfortable and long term sobriety.

§ 300x-4a. Group homes for recovering substance abusers

(a) Establishment of revolving fund to defray costs of establishing programs

For fiscal year 1989, the Secretary may not make payments under section 300x-2 of this title unless the State involved agrees -

(1) to establish, directly or through the provision of a grant or contract to a nonprofit private entity, a revolving fund to make loans for the costs of establishing programs for the provision of housing in which individuals recovering from alcohol or drug abuse may reside in groups of not less than 4 individuals;

(2) to ensure that the programs are carried out in accordance with guidelines issued under subsection (c) of this section;

(3) to ensure that not less than \$100,000 will be available for the revolving fund;

(4) to ensure that each loan made from the revolving fund does not exceed \$4000 and that each such loan is repaid to the revolving fund not later than 2 years after the date on which the loan is made;

(5) to ensure that each such loan is repaid through monthly installments and that a reasonable penalty is assessed for each failure to pay such periodic installments by the date specified in the loan agreement involved; and

(6) to ensure that such loans are made only to nonprofit private entities agreeing that, in the operation of the program established pursuant to the loan -

(A) the use of alcohol or any illegal drug in the housing provided by the program will be prohibited;

(B) any resident of the housing who violates such prohibition will be expelled from the housing;

(C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing; and

(D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

(b) Assurances of program establishment

For fiscal year 1990 and subsequent fiscal years, the Secretary may not make payments under section 300x-2 of this title unless the State involved provides assurances satisfactory to the Secretary that the State has provided for the establishment and ongoing operation of a revolving fund in accordance with subsection (a) of this section.

(c) Program guidelines

Not later than 90 days after November 18, 1988, the Secretary, acting through the Administrator, shall issue guidelines for the operation of programs described in subsection (a) of this section.

(d) Territories

The requirements established in subsections (a) and (b) of this section shall not apply to any territory of the

United States other than the Commonwealth of Puerto Rico.

(July 1, 1944, c. 373, Title XIX, § 1916A, as added Nov. 18, 1988, Pub.L. 100-690, Title II, § 2036, 102 Stat. 4202, and amended Aug. 16, 1989, Pub.L. 101-93, § 2(m)(1), 103 Stat. 608; Aug. 16, 1989, Pub.L. 101-93, § 2(m)(2), 103 Stat. 608.)

**UNIFORM
HOUSING
CODE™**

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(SEAL)

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Preface

Cities, counties and other political subdivisions are vitally interested in urban renewal, the removal of blighted structures and the conservation of repairable structures. This development, together with the necessity for cities to comply with the Workable Program requirements of the Department of Housing and Urban Development (HUD), influenced the International Conference of Building Officials to prepare a Uniform Housing Code.™ This code is designed to fill one of the primary needs for urban renewal including conservation, rehabilitation or redevelopment programs, throughout the country.

In the preparation of the Housing Code the Conference, with the assistance of representatives of the Housing and Home Finance Agency (now HUD) and the members of the committee, have developed a code which meets the requirements for effective control of housing conditions.

Because of the wide use which this Housing Code will have, and because of the different state and local laws, we suggest that in enacting this code into law consideration be given to formulating local rules and regulations to correlate the Housing Code with local zoning and subdivision regulations and for abatement procedures. The Uniform Code for the Abatement of Dangerous Buildings contains reasonable procedures for the classification and abatement of dangerous buildings of all occupancies and is compatible with this code, which is applicable only to dwellings.

Reference is made in this code to certain requirements in the Uniform Building Code, in order to eliminate duplication and the possibility of conflict.

Vertical lines in margins indicate a change in the requirements from the 1985 edition. An analysis of changes between editions is published in pamphlet form by the Conference.

Deletion indicators (◆) are provided in the margin where a paragraph or item listing has been deleted if the deletion resulted in a change in requirements.

* * *

Chapter 5

SPACE AND OCCUPANCY STANDARDS

Location on Property

Sec. 501. All buildings shall be located with respect to property lines and to other buildings on the same property as required by Section 504 and Part IV of the Building Code.

Yards and Courts

Sec. 502. (a) Scope. This section shall apply to yards and courts having required windows openings therein.

(b) **Yards.** Every yard shall be not less than 3 feet in width for one-story and two-story buildings. For buildings more than two stories in height the minimum width of the yard shall be increased at the rate of 1 foot for each additional story. Where yards completely surround the building, the required width may be reduced by 1 foot. For buildings exceeding 14 stories in height, the required width of yard shall be computed on the basis of 14 stories.

(c) **Courts.** Every court shall be not less than 3 feet in width. Courts having windows opening on opposite sides shall be not less than 6 feet in width. Courts bounded on three or more sides by the walls of the building shall be not less than 10 feet in length unless bounded on one end by a public way or yard. For buildings more than two stories in height the court shall be increased 1 foot in width and 2 feet in length for each additional story. For buildings exceeding 14 stories in

height, the required dimensions shall be computed on the basis of 14 stories.

Adequate access shall be provided to the bottom of all courts for cleaning purposes. Every court more than two stories in height shall be provided with a horizontal air intake at the bottom not less than 10 square feet in area and leading to the exterior of the building unless abutting a yard or public way. The construction of the air intake shall be as required for the court walls of the building, but in no case shall be less than one-hour fire-resistive.

Room Dimensions

Sec. 503. (a) Ceiling Heights. Habitable space shall have a ceiling height of not less than 7 feet 6 inches except as otherwise permitted in this section. Kitchens, halls, bathrooms and toilet compartments may have a ceiling height of not less than 7 feet measured to the lowest projection from the ceiling. Where exposed beam ceiling members are spaced at less than 48 inches on center, ceiling height shall be measured to the bottom of these members. Where exposed beam ceiling members are spaced at 48 inches or more on center, ceiling height shall be measured to the bottom of the deck supported by these members, provided that the bottom of the members is not less than 7 feet above the floor.

If any room in a building has a sloping ceiling, the prescribed ceiling height for the room is required in only one-half the area thereof. No portion of the room measuring less than 5 feet from the finished floor to the finished

ceiling shall be included in any computation of the minimum area thereof.

If any room has a furred ceiling, the prescribed ceiling height is required in two-thirds the area thereof, but in no case shall the height of the furred ceiling be less than 7 feet.

(b) **Floor Area.** Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

EXCEPTION: Nothing in this section shall prohibit the use of an efficiency living unit within an apartment house meeting the following requirements:

1. The unit shall have a living room of not less than 220 square feet of superficial floor area. An additional 100 square feet of superficial floor area shall be provided for each occupant of such unit excess of two.
2. The unit shall be provided with a separate closet.
3. The unit shall be provided with a kitchen sink, cooking appliance and refrigeration facilities, each having a clear working space of not less than 30 inches in front. Light and ventilation conforming to this code shall be provided.

4. The unit shall be provided with a separate bathroom containing a water closet, lavatory and bathtub or shower.

(c) **Width.** No habitable room other than a kitchen shall be less than 7 feet in any dimension.

Each water closet stool shall be located in a clear space not less than 30 inches in width and a clear space in front of the water closet stool of not less than 24 inches shall be provided.

Light and Ventilation

Sec. 504. (a) Natural Light and Ventilation. All guest rooms, dormitories and habitable rooms within a dwelling unit shall be provided with natural light by means of exterior glazed openings with an area not less than one tenth of the floor area of such rooms with a minimum of 10 square feet. All bathrooms, water closet compartments, laundry rooms and similar rooms shall be provided with natural ventilation by means of openable exterior openings with an area not less than one-twentieth of the floor area of such rooms with a minimum of 1½ square feet.

All guest rooms, dormitories and habitable rooms within a dwelling unit shall be provided with natural ventilation by means of openable exterior openings with an area of not less than one-twentieth of the floor area of such rooms with a minimum of 5 square feet.

(b) **Origin of Light and Ventilation.** Required exterior openings for natural light and ventilation shall

open directly onto a street or public alley or a yard or court located on the same lot as the building.

EXCEPTION: Required windows may open into a roofed porch where the porch:

1. Abuts a street, yard, or court; and
2. Has a ceiling height of not less than 7 feet; and
3. Has the longer side at least 65 percent open and unobstructed.

A required window in a service room may open into a vent shaft which is open and unobstructed to the sky and not less than 4 feet in least dimension. No vent shaft shall extend through more than two stories.

For the purpose of determining light and ventilation requirements, any room may be considered as a portion of an adjoining room when one half of the area of the common wall is open and unobstructed and provides an opening of not less than one tenth of the floor area of the interior room or 25 square feet, whichever is greater.

(c) **Mechanical Ventilation.** In lieu of required exterior openings for natural ventilation, a mechanical ventilation system may be provided. Such system shall be capable of providing two air changes per hour in all guest rooms, dormitories, habitable rooms and in public corridors. One fifth of the air supply shall be taken from the outside. In bathrooms containing a bathtub or shower or combination thereof, laundry rooms, and similar rooms, a mechanical ventilation system connected directly to the outside capable of providing five air changes per hour shall be provided. The point of discharge of exhaust air

shall be at least 5 feet from any mechanical ventilating intake. Bathrooms which contain only a water closet or lavatory or combination thereof, and similar rooms may be ventilated with an approved mechanical recirculating fan or similar device designed to remove odors from the air.

(d) **Hallways.** All public hallways, stairs and other exitways shall be adequately lighted at all times in accordance with Section 3312(a) of the Building Code.

Sanitation

Sec. 505. (a) Dwelling Units and Lodging Houses. Every dwelling unit and every lodging house shall be provided with a bathroom equipped with facilities consisting of a water closet, lavatory, and either a bathtub or shower.

(b) **Hotels.** Where private water closets, lavatories and baths are not provided, there shall be provided on each floor for each sex at least one water closet and lavatory and one bath accessible from a public hallway. Additional water closets, lavatories and baths shall be provided on each floor for each sex at the rate of one for every additional ten guests, or fractional number thereof in excess of ten. Such facilities shall be clearly marked for "Men" or "Women."

(c) **Kitchen.** Each dwelling unit shall be provided with a kitchen. Every kitchen shall be provided with a kitchen sink. Wooden sinks or sinks of similarly absorbent material shall not be permitted.

(d) **Fixtures.** All plumbing fixtures shall be connected to a sanitary sewer or to an approved private sewage disposal system. All plumbing fixtures shall be connected to an approved system of water supply and provided with hot and cold running water necessary for its normal operation.

All plumbing fixtures shall be of an approved glazed earthenware type or of a similarly nonabsorbent material.

(e) **Water Closet Compartments.** Walls and floors of water closet compartments, except in dwellings, shall be finished in accordance with Section 511 of the Building Code.

(f) **Room Separations.** Every water closet, bathtub or shower required by this code shall be installed in a room which will afford privacy to the occupant. A room in which a water closet is located shall be separated from food preparation or storage rooms by a tight-fitting door.

(g) **Installation and Maintenance.** All sanitary facilities shall be installed and maintained in safe and sanitary condition and in accordance with applicable requirements of the Plumbing Code.

§ 300x-25. Group homes for recovering substance abusers

(a) State revolving funds for establishment of homes

For fiscal year 1993 and subsequent fiscal years, the Secretary may make a grant under section 300x-21 of this title only if the State involved has established, and is providing for the ongoing operation of, a revolving fund as follows:

(1) The purpose of the fund is to make loans for the costs of establishing programs for the provision of housing in which individuals recovering from alcohol or drug abuse may reside in groups of not less than 6 individuals. The fund is established directly by the State or through the provision of a grant or contract to a nonprofit private entity.

(2) The programs are carried out in accordance with guidelines issued under subsection (b) of this section.

(3) Not less than \$100,000 is available for the fund.

(4) Loans made from the revolving fund do not exceed \$4,000 and each such loan is repaid to the revolving fund by the residents of the housing involved not later than 2 years after the date on which the loan is made.

(5) Each such loan is repaid by such residents through monthly installments, and a reasonable penalty is assessed for each failure to pay such periodic installments by the date specified in the loan agreement involved.

(6) Such loans are made only to nonprofit private entities agreeing that, in the operation of the program established pursuant to the loan –

(A) the use of alcohol or any illegal drug in the housing provided by the program will be prohibited;

(B) any resident of the housing who violates such prohibition will be expelled from the housing;

(C) the costs of the housing, including fees for rent and utilities, will be paid by the residents of the housing; and

(D) the residents of the housing will, through a majority vote of the residents, otherwise establish policies governing residence in the housing, including the manner in which applications for residence in the housing are approved.

(b) Issuance by Secretary of guidelines

The Secretary shall ensure that there are in effect guidelines under this subpart for the operation of programs described in subsection (a) of this section.

(c) Applicability to territories

The requirements established in subsection (a) of this section shall not apply to any territory of the United States other than the Commonwealth of Puerto Rico.

(July 1, 1944, c. 373, Title XIX, § 1925, as added July 10, 1992, Pub.L. 102-321, Title II, § 202, 106 Stat. 393.)

CHAPTER 15.05

COMPREHENSIVE PLAN - PURPOSE AND SCOPE

15.05.000 SCOPE

The Comprehensive Plan of the City of Edmonds consists of all of the elements set forth or incorporated in this title, including both text and maps.

15.05.010 PURPOSE

The Comprehensive Plan has the following purposes:

- A. To serve as the basis for municipal policy on development and to provide guiding principles and objectives for the development of regulations.
- B. To promote the public health, safety, morals, order, convenience, prosperity and the general welfare.
- C. To anticipate and influence the orderly and coordinated development of land and building use of the city and its environs, and conserve and restore natural beauty and other natural resources.
- D. To encourage coordinated development and discourage piecemeal, spot or strip zoning and inharmonious subdividing.
- E. To facilitate adequate provisions for public services such as transportation, police and fire protection, water supply, sewage treatment, and parks.

15.05.020 EFFECT OF PLAN

- A. Private Projects. All private projects requiring city review and approval shall be consistent with the Comprehensive Plan.

- B. Public Projects. No street, park or other public way, ground, place, space, or public building or structure, or utility [whether publicly or privately owned] shall be abandoned, constructed or authorized until the Hearing Examiner has reviewed and reported to the City Council on the location, extent and consistency with the Comprehensive Plan. The Hearing Examiner's report shall be advisory only. Notice of the hearing by the Hearing Examiner shall be given in the manner specified in each case by the City Council.

* * *

CHAPTER 15.10

COMPREHENSIVE PLAN - ELEMENTS

15.10.000 ELEMENTS ADOPTED

The Comprehensive Plan consists of the remaining chapters of this title, and the following additional elements of the plan which have previously been adopted and are hereby readopted by reference:

- A. Edmonds Comprehensive Policy Plan Map (adopted 1976).
- B. Edmonds Environmentally Sensitive Areas Map (adopted 1978).
- C. Comprehensive Water System Plan (as amended 1986).
- D. Engineering Report - Comprehensive Sewage Plan for the City of Edmonds, Washington, June 1965 (adopted 1966).

- E. City of Edmonds Comprehensive Parks and Recreation Plan, 1987 to 1992.
[Ord. 2607 §3, 1987].
- F. Bicycle Paths & Trails Plan.

Repeal or modification of the text of the original ordinances or resolutions adopting and/or amending any of the foregoing plans or maps shall not affect the validity of said plans or maps which are hereby readopted. Said plans or maps subsequently may be repealed or amended by ordinance or resolution making specific reference to said maps or plans. [Ord. 2564, 1986; Ord. 2274 §3, 1982].

CHAPTER 15.10

COMPREHENSIVE PLAN - ELEMENTS

15.10.000 ELEMENTS ADOPTED

The Comprehensive Plan consists of the remaining chapters of this title, and the following additional elements of the plan which have been previously adopted and are hereby readopted by reference:

- A. Edmonds Comprehensive Policy Plan Map (originally adopted 1976).
- B. Edmonds Environmentally Sensitive Areas Map (originally adopted 1978).
- C. Comprehensive Water System Plan (as amended 1986).

- D. Engineering Report - Comprehensive Sewage Plan for the City of Edmonds, Washington, June, 1965 (adopted 1976).
- E. City of Edmonds Comprehensive Parks and Recreation Plan, 1987 to 1992.
- F. Bicycle Paths and Trails Plan.
- G. Capital Improvements Plan (CIP) as the same exists or is hereafter amended.
- H. Transportation Improvement Plan (TIP) as the same exists or is hereafter amended.
- I. The Basin Studies of the City of Edmonds as the same are adopted or amended by the City Council.

Repeal or modification of the text of the original ordinances or resolutions adopting and/or amending any of the foregoing plans or maps shall not affect the validity of said plans or maps which hereby readopted. Said plans or maps subsequently may be repealed or amended by ordinance or resolution making specific reference to said maps or plans.

[Ord. 2781 §1, 1990; Ord. 2607 §3, 1987; Ord. 2664, 1986; Ord. 2274 §3, 1982].

(07/31/90)

CHAPTER 15.20

LAND USE

15.20.000 SCOPE

Whenever there are references in this chapter to categories of land use, they shall apply to areas shown on the Comprehensive Policy Plan Map as follows:

<u>Policies</u>	<u>Map Designation</u>
Single family	Low Density Residential
Multiple residential, RM	High Density Residential
Commercial	Commercial/Business
Industrial	Industrial
Community Facilities and Utilities	Public Uses

See Chapter 15.35 for areas shown as Shoreline Uses on the map. All policies apply to areas shown as Mixed on map.

15.20.005 RESIDENTIAL DEVELOPMENT

A. The City of Edmonds is unique among cities in Washington State. Located on the shores of Puget Sound, it has been able to retain (largely through citizen input) a small town, quality atmosphere rare for cities so close to major urban centers. The people of Edmonds value these amenities and have spoken often in surveys and meetings to this point. The geographical location also influences potential growth of Edmonds. Tucked between Lynnwood, Mountlake Terrace and Puget Sound, the land available for annexation and development is limited.

Living standards in Edmonds are above most, and this combined with the limited development potential, provides the opportunity for constructive policy options to govern future development. This will ensure an even better quality of life for its citizens.

Edmonds consists of a mixture of people of all ages, incomes and living styles. It becomes a more humane and interesting city as it makes room for and improves conditions for all citizens.

B. Goal. High quality residential development which is appropriate to the diverse lifestyle of Edmonds residents should be maintained and promoted. The options available to the City to influence the quality of housing for all citizens should be approached realistically in balancing economic and aesthetic consideration, in accordance with the following policies:

1. Encourage those building custom homes to design and construct homes with architectural lines which enable them to harmonize with the surroundings, adding to the community identity and desirability.
2. Protect neighborhoods from incompatible additions to existing buildings that do not harmonize with existing structures in the area.
3. Minimize encroachment on view of existing homes by new construction or additions to existing structures.
4. Support retention and rehabilitation of older housing within Edmonds whenever it is economically feasible.
5. Protect residential areas from incompatible land uses through the careful control of other types of development and expansion based upon the following principles:
 - a. Residential privacy is the most fundamental protection to be upheld by local government.
 - b. Traffic not directly accessing residences in a neighborhood must be discouraged.
 - c. Stable property values must not be threatened by view, traffic or land use encroachments.

- d. Private property must be protected from adverse environmental impacts of development including noise, drainage, traffic, slides, etc.
- 6. Require that new residential development be compatible with the natural constraints of slopes, soils, geology, vegetation and drainage.
- C. Goal. A broad range of housing types and densities should be encouraged in order that a choice of housing will be available to all Edmonds residents, in accordance with the following policies:
 - 1. Planned Residential Development. Consider planned residential development solutions for residential subdivisions.
 - a. Consider single-family homes in a PRD configuration where significant benefits for owner and area can be demonstrated (trees, view, open space, etc.).
 - b. Consider attached single-family dwelling units in PRD's near downtown and shopping centers as an alternative to multiple-family zoning.
 - 2. Multiple. The City's development policies encourage high quality site and building design to promote coordinated development and to preserve the trees, topography and other natural features of the site. Stereotyped, boxy multiple unit residential (RM) buildings are to be avoided.
 - a. Location Policies.
 - 1) RM uses should be located near arterial or collector streets.

- b. Compatibility Policies.
 - 1) RM developments should preserve the privacy and view of surrounding buildings, wherever feasible.
 - 2) The height of RM buildings that abut single family residential (RS) zones shall be similar to the height permitted in the abutting RS zone except where the existing vegetation and/or change in topography can substantially screen one use from another.
 - 3) The design of RM buildings located next to RS zones should be similar to the design idiom of the single family residence.
- c. General Design Policies.
 - 1) The nonstructural elements of the building (such as decks, lights, rails, doors, windows and window easements, materials, textures and colors) should be coordinated to carry out a unified design concept.
 - 2) Site and building plans should be designed to preserve the natural features (trees, streams, topography, etc.) of the site rather than forcing the site to meet the needs of the imposed plan.
 - 3. Mobile Homes. Update design standards to ensure quality parks heavily landscaped both for screening exterior and for appearance of interior.
- D. Goal. Provide affordable (subsidized housing, if need be) for elderly, disadvantaged, disabled and low income in the proportion to population of Edmonds in accordance with the following policies:

1. The City should aggressively pursue funds to construct housing for elderly, disabled and low income. Units should be disbursed so as to blend into neighborhood and be designed to be an asset to area and pride for inhabitants. [Ord. 2527 §3, 1985.]

15.20.010 COMMERCIAL LAND USE

- A. General. Past and present commercial development in the City of Edmonds has been oriented primarily to serving the needs of its citizens. It also has attempted to offer a unique array of personalized and specialty type shopping opportunities for the public. The recently completed Milltown shopping arcade is an excellent example of this type of development. It is essential that future commercial developments continue to harmonize and enhance the residential small town character of Edmonds that its citizens so strongly desire to retain. By the same token, the City should develop a partnership with business, citizens and residents to help it grow and prosper while assisting to meet the various requirements of the City's codes and policies.
- B. Goal. The Highway 99 arterial has been recognized historically as a commercial district which adds to the community's tax and employment base. Its economic vitality is important to Edmonds and should be supported. Commercial development in this area is to be encouraged to its maximum potential. All commercial development should be designed and located so that it is economically feasible to operate a business and provide goods and services to Edmonds residents and tourists in a safe, convenient and attractive manner, in accordance with the following policies:

1. A sufficient number of sites suited for a variety of commercial uses should be identified and reserved for these purposes. The great majority of such sites should be selected from parcels of land already identified in the comprehensive plan for commercial use and/or zoned for such use.
2. Parcels of land previously planned or zoned for commercial use but which are now or will be identified as unnecessary, or inappropriate for such use by additional analysis, should be reclassified for other uses.
3. The proliferation of strip commercial areas along Edmonds streets and highways and the development of commercial uses poorly related to surrounding land uses should be strongly discouraged.
4. The design and location of all commercial sites should provide for convenient and safe access for customers, employees and suppliers.
5. All commercial developments should be carefully located and designed to eliminate or minimize the adverse impacts of heavy traffic volume and other related problems on surrounding land uses.
6. Neighborhood scale commercial development (convenience stores) should be located at major arterial intersections and should be designed to minimize interference with through traffic.
7. Special consideration should be given to major land use decisions made in relation to downtown Edmonds.
- C. Policy. It shall be the stated policy of the City of Edmonds to discourage and, to the extent permitted by law, prohibit the encroachment of commercial

uses from Highway 99 into adjacent residential neighborhoods.

1. It shall be the policy of the City not to expend public funds to promote or encourage commercial encroachment through the preferential extension of City services and infrastructures.
2. Traffic control, routing and diversion shall not encourage the spread or extension of commercial use into residential neighborhoods. To the extent consistent with the public health, safety and welfare, the actions of the City shall attempt to divert and route commercial traffic from residential streets.
3. This policy statement shall not be interpreted to be a statement of prejudgmental bias with regard to any application for rezoning of any residential property to a commercial use. Each such application shall be considered on its individual merits and the applicant shall be accorded all rights guaranteed by law. It shall be the stated policy of the City that no such rezone shall be granted to permit a commercial encroachment when:
 - a. the encroachment does not conform to the Comprehensive Plan;
 - b. no changes have occurred in the character, conditions or surrounding neighborhood that would justify or otherwise substantiate the rezone request;
 - c. the proposed rezone bears no reasonable relationship to existing land uses and zoning of surrounding or nearby property; or
 - d. the relative gain to the individual property owner is outweighed by hardship imposed upon the public. [Ord. 2527 §4, 1985.]

15.20.020 INDUSTRIAL LAND USE

- A. General. Interestingly, industrial development played a major role in the early development of Edmonds. Sawmills, wharves, log ponds and other wood products industries lined the Edmonds waterfront at the turn of the century. However, as time passed, Edmonds developed into a very attractive residential community and its once thriving lumber industry faded into oblivion. Today, Edmonds still retains much of its residential, small town charm despite the large amount of urban development which has occurred in and around the City during the outward expansion of the Seattle metropolitan area during the past twenty-five years.

Industrial development in the more traditional sense has not occurred in Edmonds to a significant degree since its early milltown days. Most new industry which has located in the community since the 1950's has been largely of light manufacturing or service industry nature. Some examples include furniture manufacturing, printing and publishing, electronic components assembly and health care services.

Future industrial development should be carefully controlled in order to insure that it is compatible with the residential character of Edmonds. Small scale, business-park oriented light industries and service related industries should be given preference over more intensive large scale industries. Great care should be given to carefully siting and designing all new industrial development in order to fully minimize or eliminate its adverse off-site impacts.

- B. Goal. A select number of industrial areas should be located and developed which are reasonably attractive and contribute to the economic growth and stability of Edmonds without degrading its natural or

residential living environment, in accordance with the following policies:

1. Light industrial uses should be given preference over heavy industrial uses.
2. The clustering of industrial uses in planned industrial parks should be required when site is adequate.
3. Adequate buffers of landscaping, compatible transitional land uses and open space should be utilized to protect surrounding land areas from the adverse effects of industrial land use. Particular attention should be given to protecting residential areas, parks and other public-institutional land uses.
4. All industrial areas should be located where direct access can be provided to regional ground transportation systems (major State Highways and/or railroad lines).

15.20.030 COMMUNITY FACILITIES AND UTILITIES

- A. General. The provision of community facilities and utilities often plays a major role in influencing the scale, direction and character of new urban development. Although Edmonds already has its basic community facilities and utilities system in place, significant improvements and additions to these facilities and systems are expected and could have a measurable influence on new growth within the City. Therefore, it is important that any such improvements or additions be carefully coordinated with the adopted planning policies and comprehensive land use and transportation plans of Edmonds.

Community Facilities – Include all significant buildings, structures and facilities which are designed to

serve a public need. These facilities include but are not limited to, educational facilities, libraries, health care facilities, solid waste disposal facilities and transportation terminals.

Community Utilities – Include all linear distribution and collection systems which provide a basic life supporting product or service. These systems include but are not limited to, electricity, gas, water, communication, garbage collection, sanitary sewers and storm sewers.

- B. Goal. Community facilities and utilities in the City of Edmonds should be designated and located in a manner which will most efficiently and effectively serve the needs of the public and also implement the objectives of the Comprehensive Plan, in accordance with the following policies:
1. The provision of community facilities and utilities should be utilized as a tool for creating a well planned community.
 2. Community facilities and utilities should be designed, located and constructed in a manner which will preserve the integrity of Edmonds existing land forms, vegetation, drainage ways and natural systems.
 3. The existing capacity in urban utility systems should be utilized before making substantial extensions and/or expansions, except where full utilization of existing capacity would defeat other important development and environmental protection objectives.
 4. A total capacity should be provided in Edmonds urban utility system that is reasonably sized to accommodate anticipated and desired population growth. Overbuilding that would require present

residents to carry the costs of substantial, unutilized capacity in these systems should also be avoided.

5. Developers should be required to provide the maintain adequate facilities within their projects for storm drainage control. They should be encouraged to consolidate such controls in cooperation with their neighbors and the City where such consolidation results in a more efficient drainage system.
6. All storm drainage control projects should be consistent with community and regionally developed plans for dealing with this problem. The City should study the feasibility of a regional drainage program within each sub-basin of the community.
7. Surface water runoff and storm drainage facilities should be designed and utilized in a manner which protects against the destruction of private property, the disruption of natural drainage ways and the degradation of water sources and water quality. Oil separators, biofilters and similar devices should be required as necessary to pre-treat runoff prior to discharge into key water bodies.
8. Whenever possible, the provision of new utility systems should be consolidated into existing rights-of-way and easements.
9. New community facilities should be located where they will be readily accessible to Edmonds residents and will serve them conveniently and economically.
10. The development of shared community facilities among various public and institutional land users should be promoted.

11. The cooperative formulation and implementation of long-range acquisition and development plans for all community facilities and utilities by all public and institutional bodies should be strongly encouraged.
12. Community facilities and utilities development and expansion should always be compatible with surrounding land uses and consistent with the provisions of the Comprehensive Plan.
13. The extension or improvement of urban utility systems should be carefully staged in order to avoid the encouragement of poorly timed and premature land use development.
14. The City should assist private property owners in the financing of utility systems through aggressive pursuit of federal and State grants; and provide assistance for property owners wishing to develop local improvement districts.
15. Developers and business owners should be responsible for financing improvements which offset the direct impacts of their projects. The general public should assist in the provisions of facilities and utilities of general benefit to the community. [Ord. 2527 §5, 1985.]

15.20.040 OPEN SPACE

- A. Generally in urban areas a lack of open space has been one of the major causes of residential blight. This lack has contributed to the movement of people from older densely developed neighborhoods to peripheral areas still possessing open areas.

Open space must be reserved now for assurance that future settled areas are relieved by significant open

land, providing recreational opportunities as well as visual appeal.

Not all vacant land in the City should be considered desirable or valuable for open space classification. Therefore, the following set of criteria-standards have been developed for determining those areas most important for this classification.

- B. Goal. Open space must be seen as an essential element determining the character and quality of the urban and suburban environment, in accordance with the following policies.
1. Undeveloped public property should be studied to determine its suitability and appropriate areas designed as open space.
 - a. No city-owned property should be relinquished until all possible community uses have been explored.
 2. All feasible means should be used to preserve the following open spaces:
 - a. Lands which have unique scientific or educational values.
 - b. Areas which have an abundance of wildlife particularly where there are habitats of rare or endangered species.
 - c. Natural and green belt areas adjacent to highways and arterials with the priority to highways classified as scenic.
 - d. Areas which have steep slopes or are in major stream drainage ways, particularly those areas which have significance to Edmonds residents as water sheds.

- e. Land which can serve as buffers between residential and commercial or industrial development.
 - f. Bogs and wetlands.
 - g. Land which can serve as buffers between high noise environments and adjacent uses.
 - h. Lands which would have unique suitability for future recreational uses both passive and active.
 - i. Areas which would have unique rare or endangered types of vegetation.
3. Open space should be distributed throughout the urban areas in such a manner that there is both visual relief and variety in the pattern of development and that there is sufficient space for active and passive recreation.

Provide views and open space in areas of high density or multiple housing by requiring adequate setback space and separation between structures.

- C. Goal. Edmonds possesses a most unique and valuable quality in its location on Puget Sound. The natural supply of prime recreational open space, particularly beaches and waterfront areas, must be accessible to the public, in accordance with the following policies:
1. Edmonds saltwater shorelines and other waterfront areas should receive special consideration in all future acquisition and preservation programs.
 2. Provide wherever possible, vehicular or pedestrian access to public bodies of water.

15.20.050 SIGNIFICANT AREAS

- A. General. Edmonds is one of the oldest settlements in the southwest county area. Indians made occasional use of the beach areas and later explorations were made by both British and Americans. Certain geographical areas within Edmonds have special significance because of historical, archeological, architectural, recreational, social, cultural and scenic importance. Policies should be established to identify and maintain these sites and to encourage compatible surrounding uses.
- B. Goal - Historical. Encourage the identification, maintenance and preservation of historical sites in accordance with the following policies:
1. Written narratives and visual aids should be made available for sites. This should also include providing markers and maps for identifying and visiting these sites.
 2. Compatible land uses should be made of the immediate surrounding areas.
 3. City should work with other public agencies and the local historical society to determine priorities and establish methods of public and private fundings.
 4. General identification of historical sites would include but not be limited to: Brackett's Landing, Carnegie Library Building, Anderson Home, etc.
- C. Goal - Archeological. Encourage the identification and maintenance of possible archeological sites in accordance with the following policies:
1. Written narratives and visual aids should be made available, including providing markers for identification.

2. General identification of archeological sites would include, but not be limited to: Old Indian Cemetery (vicinity of 9th and Dayton), and Indian encampment sites in the vicinity of Union Oil Dock.
- D. Goal - Architectural. Encourage the identification and maintenance of significant architectural structures in accordance with the following policies:
1. Compatible land uses should be made of surrounding areas.
 2. Encourage the identification by markers and maps for public viewing.
 3. Significant architectural structures would include, but not be limited to: Beeson Building, Carnegie Library, Dent Estate, Parmelee House, Anderson House.
 4. Additions and alternations to significant architectural buildings should conform to the style and period of the initial construction as much as possible.
- E. Goal - Recreation
1. Encourage public access to significant recreational areas.
 2. Significant recreational areas would include, but not be limited to: Puget Sound Shorelines, Lake Ballinger, University Properties, Lund's Gulch, etc.
 3. Compatible land uses should be made of surrounding areas.
- F. Goal - Social. Identify and maintain significant public and private social areas in accordance with the following policies:

1. Compatible land uses should be made of surrounding lands.
 2. Pursue public and private funding for such social areas as: Senior Center, Anderson Center, Edmonds Museum, Wade James Theater, Maplewood Rock and Gem Club House.
- G. Goal - Cultural. Identify, maintain and develop cultural facilities both public and private in the areas of drama, dance, theaters, museums, etc. in accordance with the following policies:
1. Encourage compatible land uses surrounding cultural sites.
 2. Pursue public and private funding to develop and operate such facilities.
 3. Cultural sites would include, but not be limited to: The Wade James Theater, Cascade Symphony, Anderson Center, Museum, Edmonds Theatre, etc.
- H. Goal - Scenic. Identify, maintain and enhance scenic areas through the City in accordance with the following policies:
1. Incorporate scenic and aesthetic design features into development of public projects.
 2. Preserve scenic features whenever possible in development of public projects.
 3. Scenic areas within City would include, but not be limited to: The stand of evergreens on the H.O. Hutt property, the evergreens in front of the Edmonds Historical Museum, and the "Anchor Tree" on the Echelbarger property.

15.20.060 GROWTH MANAGEMENT

- A. General. Growth management policies are necessary to prevent unrestricted haphazard and undesirable growth. A community such as Edmonds with attractive natural features, a pleasant residential atmosphere and proximity to a large urban center is subject to constant growth pressures.

Edmonds' present population is 29,001. Assuming that there is no change in existing zoning, no future annexation, no change in rate of unit-construction as averaged from 1970-73, and no change in population per dwelling unit from the 1974 level, the saturation population in Edmonds by the year 2000 would fall between a minimum of 37,204 and a maximum of 42,863.

According to information contained in the River Basin Coordinating Committee Study on Growth Management citizens are now questioning whether an area must accept growth projections as inevitable. These projections are useful but are really only statistics indicating trends, not necessarily what is most desirable for the region. An extensive program of community involvement is essential in determining a meaningful, desirable growth level.

As communities across the country are attempting to deal with the growth issues, they are utilizing the comprehensive planning process in conjunction with zoning as tools to carry out their desired growth policy. Other methods which are being utilized include: building moratoriums, control of timing and location of capital improvements, acquisition of open space, historic sites, preservation and transfer of development right to supplement or even replace conventional zoning. However, techniques which have worked in one area may not work in another; solutions must be designed for a specific area. It is up

to the community to determine their desired growth level and up to the government, particularly elected officials to implement the desired policies.

- B. Goal. Growth management policies should be developed which will insure that as a residential community, Edmonds continues to be heralded as "The Gem of Puget Sound," in accordance with the following policies:

1. Decisions affecting the growth pattern of the community should be made with a maximum of citizen participation.
2. The Comprehensive Plan and Zoning Ordinance should be written and maintained in such a manner to guarantee that in the event of "Maximum Development" there are sufficient resources to insure basic community services and ample provisions made for necessary open space, parks and other recreation facilities.
3. The role of commercial and industrial enterprises, the attendant tax base and provision for consumer needs, should be considered as secondary to the residential aspect of the area rather than as the dominate activity of the community.
4. Any growth or development should strive to preserve for itself and its neighbors the following values:
 - a. Light (including direct sunlight)
 - b. Privacy
 - c. Views, open spaces, shorelines and other natural features.
 - d. Freedom from air, water, noise and visual pollution.

5. Any residential growth should be designed to promote as much as possible a balanced mixture of income and age groups.
6. Edmonds should cooperate with surrounding communities to ensure that the regional growth policy is consistent with the stated local policy.
7. The City should maintain an adequate staff to enable the implementation of the foregoing policies.

* * *

CHAPTER 15.45

HUMAN RESOURCES

15.45.000 ECONOMIC ENVIRONMENT/EMPLOYMENT

- A. General. The economic environment in the City of Edmonds appears to be sedentary. Any prospects of employment opportunities beyond small growth in the existing business appears remote.

To date the City of Edmonds appears to be the major employer in the community. The occupational analysis of the City's Affirmative Action Plan indicates that the total City work force was 141 for the period ending August 31, 1973, of which 31 were females and 7 minorities.

- B. Goal. Assure that opportunities are available in the community to engage in economic pursuits which are both beneficial and satisfying in accordance with the following policies:
1. Explore means by which economic and employment opportunities can be encouraged in the City.

2. Encourage the development of the City's capacities to forecast the evaluate the various economic development alternatives.

15.45.010 HOUSING

- A. General. Although non-white and low-to-moderate income families have tended to remain in central cities such as Everett and Seattle, they are also attracted to a residential community such as Edmonds because of the safe and amenable environment.

The City adopted a fair housing ordinance in June 1968 which called for a Fair Housing Commission. The Commission was appointed on April 22, 1975, but rules of procedure have not been adopted as of this date.

The Washington State Office of Community Development has estimated "that a family in Washington state today needs an income of about \$15,000 per year to have real freedom of choice in the home ownership market." They estimate the total monthly cost of the median new house has increased by 33% between 1970 and 1973 while median family income has increased by only 11%. In Snohomish County 56% of the households with incomes under \$10,000 are paying excessive housing costs (over 25% of income).

A recent population analysis conducted by the Edmonds Planning Staff utilizing the 1970 census cites that there is an unusually large percentage of retired and elderly persons 62 and over who reside in the downtown census tract #505 and tract #504. Many of these residents pay an excessive portion of

their income or pension on rent or for increasing taxes if they own their homes.

Within the Edmonds City Limits there are 80 rental units managed by the Washington Housing Service available for senior citizens who qualify for rent subsidy. According to authorities of the Washington Housing Service there is a waiting list for these units and 59 of those desiring occupancy are senior citizens of Edmonds. As of February 1975, the Department of Public Assistance month summary cites that 127 families with Edmonds addresses were on Public Assistance and 43% of these families are renting a house. The average rent is \$125 per month excluding utilities.

There are approximately 100 disabled/handicapped citizens in Edmonds who are receiving assistance for their disabilities.

Available data suggests that a definite need exists in the City of Edmonds for a form of housing assistance and those in need should be able to stay in their own community. Many senior citizens and handicapped persons owning their own homes are unable to afford to perform minimum maintenance, thus their homes are deteriorating and their safety and comfort are in peril.

- B. Goal - Housing I - Discrimination and Fair Housing - Goal I. There should be adequate housing opportunities for all families and individuals in the community regardless of their race, age, sex, religion or economic circumstances.
- C. Goal - Housing I- Discrimination and Fair Housing - Goal 2. Insure that past attitudes do not establish a precedent for future decisions pertaining to public accommodation and fair housing in accordance with the following policy:

1. The Fair Housing Commission should communicate with the private sector to ensure that current laws related to fair housing are understood and adhered to.
- D. Goal - Housing II - Low Income, Elderly and Handicapped Housing. A decent home in a suitable living environment for each household in accordance with the following policies:
1. Encourage the utilization of the housing resources of the federal government to assist in providing adequate housing opportunities for the low income, elderly and handicapped citizens.
 2. The City should work with the Washington Housing Service and other agencies to:
 - a. Provide current information on housing resources;
 - b. Determine the programs which will work best for the community.
- E. Goal - Housing III - Housing Rehabilitation. Preserve and rehabilitate the stock of older housing in the community in order to maintain a valuable housing resource in accordance with the following policies:
1. Program should be developed which offers free or low cost minor home maintenance service to low income, elderly or handicapped persons.
 2. Building code enforcement should be utilized to conserve healthy neighborhoods and encourage rehabilitation of those that show signs of deterioration.
 3. Ensure that an adequate supply of housing exists to accommodate all households that are displaced as a result of any community action.

4. Evaluate City ordinances and programs to determine if they prevent rehabilitation of older buildings.

15.45.020 HEALTH CARE

A. General.

1. Rest Homes - there are three rest-nursing homes serving the Edmonds Community, with a combined capacity of 320 beds. There is a need for more intermediate care facilities (those without provisions for intensive nursing care) as only one such facility exists in South County. A need of approximately 40 more beds has been estimated.
2. Hospital - There is one in Edmonds which serves all of South County and operates at 78-80% occupancy. The hospital could be expanded from its present 160 bed capacity up to 250 beds but expansion is unnecessary at present. Due to the increased demand for emergency room services, hospital officials plan to increase this facility. Demand for emergency facilities is due in part to the unavailability of doctors after hours. The hospital does outpatient, lab work, therapy, minor surgery, EKG's, etc.
3. Doctors and Trained Medical Personnel - It is recommended for urban areas that there should be one doctor for every 1500 people. Edmonds has a sufficient ratio, however, it has been recommended that doctors stagger their days off and be available some evenings. This would reduce the load at the emergency care facility of the hospital and provide desired medical service to the community.
4. Visiting Nurse Association - Nursing services to individual patients in the home. This service is

provided on a sliding scale which is related to type of care required and is covered by Medicare, private insurance, etc. Visiting nurse personnel made 917 home visits in South County last year.

5. Public Health Services - Snohomish County Health District Functions as the official health department for Snohomish County. The Health District provides a broad spectrum of services in the following areas:
 - a. Nursing Division Programs - Maternal - child health, adult health; Communicable Disease - prevention and control, etc.
 - b. Vital Statistics - Birth and death certificates, etc.
 - c. Sanitation - Septic tank permits and inspections; water testing, etc.
 - d. Environmental Health - Environmental impacts. Regulation and inspection of land fills and dumps, swimming pools, schools, water supplies, etc.
 - e. Veterinarian - Inspection of wholesale and retail food operations; animal complaints.
 - f. Laboratory Services - Tests of many different substances (e.g., water quality, milk, waste water, hemoglobin, etc.).
 - g. Clinic Services - Immunizations; V.D. exams; and TB skin tests.
6. Mental Health - There is a major shortage of funds for ongoing mental health facilities throughout the County, and there is a great need for services in the area although they are generally not demanded due to the lack of knowledge of their availability. Stevens Hospital has recently

established a psychiatric facility. Closure of state mental hospital facilities will increase the need for community mental health facilities providing out-patient services primarily.

- B. Goal. Assure that opportunities for adequate health care services are available to all citizens of Edmonds regardless of their economic circumstances in accordance with the following policies:
 1. The City should cooperate wherever possible with both state and local health administrators and private practitioners to assure and maintain an adequate health delivery system in the community.
 2. The City should consider and review the minimum health and medical care goals and policies as offered by the Regional Health Planning Agencies to determine if they address local needs.
 3. The City should communicate information to its citizens about the availability of public health services.
 4. Emphasis should be placed on preventive medicine.

15.45.030 LAW AND JUSTICE

- A. General. The crime statistics in the Edmonds community are lower than the national average for the major categories: Rape, theft, murder, etc. The 1974 Police Department Report indicates that one of the most serious problems in the community is burglary by juveniles. However, there are problem areas that are not accurately reflected in categorical statistics.

1. Child abuse, technical (usually affecting younger children, i.e., abandonment, no food), and physical (beating, etc., which usually involves an adult or an older child).
2. Alcohol is cited as the #1 social problem in the community and is a major factor behind a majority of crimes committed in the community.
3. Burglary (breaking and entering) is increasing.

Representatives of the Police Department expressed a need for established community social services facilities for the purpose of temporary detention, counseling and rehabilitation for juveniles who come in contact with the law. The Snohomish Law and Justice Planning Committee have also determined that the most important problem in the juvenile justice system is the failure to provide adequate community resources for delinquent youths. The most important needs are:

1. Foster home and group living situations for delinquent youths in need of this alternative placement;
2. Educational and vocational training and counseling;
3. Adequate community based counseling services.

A juvenile diversion program has been established.

The City re-established the municipal court in January, 1975, which will make the court more accessible to the community in the future.

- B. Goal. The City, as a socially responsible agency, will administer law and justice in as fair a manner as possible, for all of its citizens in accordance with the following policies:

1. Establish effective liaison between city departments, schools, public and private agencies to identify and solve problems in the community.
2. Establish a process to review the impact of law enforcement activities in the community and provide for a high level of citizen participation in this program.
3. Encourage citizen observation and educational contacts with the municipal court in order to familiarize citizens, particularly young people, with the process.
4. Assure that police personnel are adequately trained and have access to continuing professional education.

15.45.040 CULTURAL FACILITIES

- A. General. Existing cultural facilities in the City of Edmonds can be divided into two categories:

1. Those funded, supported and maintained by private groups and organizations such as Wade James Theatre, Art Gallery, Gallery North, etc., and
2. Public facilities such as Sno-Isle Regional Library, Historical Museum, etc.

Because of community emphasis on both the performing and visual arts, community housing for such events becomes increasingly important to the citizens of Edmonds. An adequate public facility for plays, concerts, lectures and art shows is non-existent in the City of Edmonds. In addition, space owned by the City is limited for meetings, community events, etc.

The City has recently appointed a seven member Civic Arts Commission to encourage cultural and artistic activities.

- B. Goal. The existing interest for both the performing and visual arts should be maintained and enhanced in accordance with the following policies:
 - 1. Areas of the City which are most suitable for a cultural facility or cultural usage should be identified;
 - 2. The City administration should take full responsibility for providing adequate facilities to house the cultural events in the community.
- C. Goal. Encourage formulation of programs which will develop a sense of cultural awareness in all segments of the community in accordance with the following policy:
 - 1. The Arts Commission should work with the Edmonds School District and with all educational entities, to develop cooperative programs related to arts and other cultural activities.

15.45.050 EDUCATION

- A. General. The educational facilities within the city limits are adequate for its citizens at this time and do allow for some growth.
- B. Goal. There should be an open and forthright flow of information and communication between City officials and the School District as well as cooperation on all levels between these two agencies in accordance with the following policies:
 - 1. The City and School District must keep each other apprised of their intentions in regard to

educational facilities already closed or slated for closure in the near future.

- 2. Greater utilization of school facilities by the community is a concept which should be explored.
- 3. The School District and the City should work together on cultural and recreational programs to prevent overlapping of services and encourage complementary programs.

15.45.060 SOCIAL SERVICES

- A. General. It has become evident that Edmonds needs some forms of social services. There is a need for receiving homes for children under the age of 18 who need temporary shelter and perhaps two or three group homes to accommodate such people as the mentally retarded and dependent child.

Edmonds is also in need of other types of agencies such as a drug treatment and/or alcohol abuse treatment center and counseling services.

- B. Goal. The community should take the responsibility to assure accessibility to social service facilities for citizens who are in need of them in accordance with the following policies:
 - 1. The City should encourage its residents to participate in the receiving home program set up by the Department of Social and Health Services to provide temporary accommodations for children under 16 years of age.
 - 2. The City should make provisions in the zoning code to govern placement and operation of group homes and other social service facilities:
 - a. The ordinance should define the various types of social agencies, group homes, foster

homes, receiving homes, rehabilitation centers, etc., and designate what type of services will be allowed within the City.

- b. Edmonds residents should be made aware when facilities are proposed within a neighborhood by appropriate notification procedures.
 - c. Agencies which wish to locate within the City should clearly indicate the kind of service to be provided.
3. Because of the number of senior citizens in the community, the City should continue to support the South County Senior Center programs.

TITLE 16
ZONE DISTRICTS

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CHAPTER 16.00
ZONE DISTRICTS - PREFACE AND PURPOSE

16.00.000 TITLE

Titles 16 and 17, of the Edmonds Community Development code, may be referred to as the Zoning Ordinance.

16.00.010 PURPOSES

In addition to the purposes stated in Section 16.05.010 for the Comprehensive Plan, the Zoning Ordinance has the following purposes:

- A. To assist in the implementation of the adopted Comprehensive Plan for the physical development of the City by regulating and providing for existing uses and uses planned for the future as specified in the Comprehensive Plan.
- B. To protect the character and the social and economic stability of residential, commercial, industrial and other uses within the City, and to ensure the orderly and beneficial development of these uses by:
 - 1. Reserving and retaining appropriate areas for each type of use;
 - 2. Preventing encroachment into these areas by incompatible uses; and
 - 3. By regulating the use of individual parcels of land to prevent unreasonable detrimental effects of nearby uses.

16.00.020 APPLICABLE TO OTHER TITLES

All uses in every zone district are subject to the General Zoning Regulations of Title 17 and to applicable regulations and policies contained in other titles of the Community Development Code.

CHAPTER 16.10 RESIDENTIAL ZONES - PURPOSES

16.10.000 PURPOSES

The general purposes of the Residential, or R, zones are:

- A. To provide for areas of residential uses at a range of densities consistent with public health and safety and the adopted Comprehensive Plan.
 - B. Any growth or development should strive to preserve for itself and its neighbors the following values:
 - 1. Light (including direct sunlight).
 - 2. Privacy.
 - 3. Views, open spaces, shorelines and other natural features.
 - 4. Freedom from air, water, noise and visual pollution.
 - C. To provide for community facilities which complement residential areas and benefit from a residential environment.
 - D. To minimize traffic congestion and avoid the overloading of utilities by relating the size and density of new buildings to the land around them, the capacity of nearby streets, and the availability of utilities.
 - E. To protect residential uses from hazards and nuisances, such as fire, explosion, noxious fumes and noise, odor, dust, dirt, smoke, vibration, heat, glare, and heavy truck traffic, which may result from other, more intense, land uses.
-

CHAPTER 16.20
RS - SINGLE-FAMILY RESIDENTIAL

16.20.000 PURPOSES

The RS zone has the following specific purposes in addition to the general purposes for residential zones of Sections 16.00.010 and 16.10.000:

- A. To reserve and regulate areas primarily for family living in single-family dwellings.
- B. To provide for additional non-residential uses which complement and are compatible with single-family dwelling use.

16.20.010 USES

- A. Permitted Primary Uses.
 - 1. Single-family dwelling units.
- B. Permitted Secondary Uses.
 - 1. Foster homes.
 - 2. Home occupation, subject to the requirements of Chapter 20.20.
 - 3. The renting of rooms without separate kitchens to one or more persons.
 - 4. The keeping of three or fewer domestic animals.
 - 5. The keeping of horses, subject to the requirements of Chapter 5.05.
 - 6. The following accessory buildings:
 - a. Fallout shelters.
 - b. Private greenhouses covering no more than five percent of the site.

- c. Private stables.
 - d. Private parking for no more than five cars.
 - e. Private swimming pools and other private recreational facilities.
- 7. Private residential docks or piers.
- 8. Family day care in a residential home.
- C. Primary Uses Requiring a Conditional Use Permit.
 - 1. Limited community facilities, located on arterial streets only, including only the following: elementary schools, nursery schools, fire stations, electric substations, pumping stations, water storage, libraries, churches, parks, recreation facilities and bus stop shelters.
- D. Secondary Uses Requiring a Conditional Use Permit.
 - 1. Mini-day care facilities and preschools.
 - 2. Guest house.
 - 3. Amateur radio transmitting antenna.
 - 4. Accessory dwelling units.

[Ord. 2673 §1, 1988; Ord. 2605 §1, 1987; Ord. 2458 §1, 1984; Ord. 2352 §8, 1983; Ord. 2283 §1, 1982.]

16.20.020 SUBDISTRICTS

There are established five subdistricts of the RS zone in order to provide site development standards for areas which differ in topography, location, existing development and other factors. These subdistricts shall be known as the RS-6 zone, the RS-8 zone, the RS-12 zone, the RSW-12 zone, and the RS-20 zone.

16.20.030 TABLE OF SITE DEVELOPMENT STANDARDS

SUB DIS- TRICT	MINI- MUM LOT AREA (Sq. Ft.)	MINI- MUM LOT WIDTH	MINI- MUM STREET SETBACK	MINI- MUM SIDE SET- BACK	MINI- MUM REAR SET- BACK	MAXI- MUM HEIGHT	MAXI- MUM COVER- AGE (%)	MINIMUM PARKING SPACES
RS-20	20,000	100'	25'	35' & 10'	25'	25'	35%	1
RS-12	12,000	80'	25'	10'	25'	25'	35%	1
RSW-12	12,000	--	15'	10'	35'	25'	35%	1
RS-8	8,000	70'	25'	7 1/2'	15'	25'	35%	1
RS-6	6,000	60'	20'	5'	15'	25'	35%	1

See Chapter 17.50 for specific parking requirements.

35' total of both sides, 10' minimum on either side.

Lots must have frontage on the ordinary highwater line and a public street or access easement approved by the Hearing Examiner.

16.20.040 SITE DEVELOPMENT EXCEPTIONS

- A. Average Front Setback. If a block has residential buildings on more than one-half of the lots on the same side of the block, the owner of a lot on that block may use the average of all the setbacks of the existing residential buildings on the same side of the street as the minimum required front setback for the lot.
- B. Eaves and Chimneys. Eaves and chimneys may project into a required setback not more than 30 inches.
- C. Porches and Decks. Uncovered and unenclosed porches, steps, patios, and decks may project into a required setback not more than one-third of the required setback, or four feet, whichever is less, provided that they are no more than 30 inches above ground level at any point.
- D. Setback Adjustments. Chapter 20.50 contains a procedure for adjusting distances and locations in special situations.
- E. Corner Lots. Corner lots have no rear setback; all setbacks other than the street setbacks shall be side setbacks.
- F. Docks, Piers, Floats.
 1. Height. The height of a residential dock or pier shall not exceed five feet above the ordinary high water mark. The height of attendant pilings shall

not exceed five feet above the ordinary high water mark or that height necessary to provide for temporary emergency protection of floating docks.

2. Length. The length of any residential dock or pier shall not exceed the lesser of 35 feet or the average length of existing decks or piers within 300 feet of the subject dock or pier.
3. Width. The width of any residential dock or pier shall not exceed 25% of the lot width when measured parallel to the shoreline.
4. Setbacks. All residential docks or piers shall observe a minimum 10 foot side yard setback from a property line or a storm drainage outfall. Joint use docks or piers may be located on the side property line, provided that the abutting waterfront property owners shall file a joint use maintenance agreement with the Snohomish County Auditor in conjunction with, and as a condition of, the issuance of a building permit. Joint use docks or piers shall observe all other regulations of this subsection.
5. Number. No lot shall have more than one dock or pier or portion thereof located on the lot.
6. Size. No residential dock or pier shall exceed 400 square feet.
7. Floats. Offshore recreational floats are prohibited.
8. Covered Buildings. No covered building shall be allowed on any residential dock or pier. [Ord. 2605 §2, 1987].

16.20.050 SITE DEVELOPMENT STANDARDS – ACCESSORY BUILDINGS

- A. General. Accessory buildings shall meet all of the standards of Section 16.20.030 except as specifically provided in this section.
- B. Height. Height shall be limited to 15 feet, except for amateur radio transmitting antennas.
- C. Rear Setbacks. The normally required rear setback may be reduced to a minimum of five feet for accessory buildings covering less than 600 square feet of the site.
- D. Satellite Television Antenna. The following regulations shall apply to the installation of a satellite television antenna:
 1. General. Satellite television antennas must be installed and maintained in compliance with the Uniform Building and Electrical Codes as the same exist or are hereafter amended. A building permit shall be required in order to install any such device.
 2. Setbacks. In all zones subject to the provisions contained herein, a satellite television antenna shall be located only in the rear yard of any lot. In the event that no usable satellite signal can be obtained in the rear lot location or in the event that no rear lot exists as in the case of a corner lot, satellite television antennas shall then be located in the side yard. In the event that a usable satellite signal cannot be obtained in either the rear or side yard, then a roof mounted location may be approved by the staff provided, however, that any roof mounted satellite antenna shall be in a color calculated to blend in with existing roof materials and, in the case of a parabolic, spherical or dish antenna shall not exceed

nine (9) feet in diameter unless otherwise provided for by this section. In no event shall any roof mounted satellite television antenna exceed the maximum height limitations established by this section.

3. Aesthetic. Satellite television antennas shall be finished in a non-garish, non-reflective color and surface which shall blend into its surroundings. In the case of a parabolic, spherical or dish antenna, said antenna shall be of a mesh construction.
4. Size and Height. Maximum size for a ground mounted parabolic, spherical or dish antenna shall be twelve (12) feet in diameter. No ground mounted antenna shall be greater than fifteen (15) feet in height unless otherwise approved for waiver as herein provided. Roof mounted satellite television antennas shall not exceed the lesser of the height of the antenna when mounted on a standard base provided by the manufacturer or installer for ordinary operation of the antenna or the height limitation provided by the zoning code.
5. Number. Only one satellite television antenna shall be permitted on any residential lot or parcel of land. In no case shall a satellite television antenna be permitted to be attached to a portable device for the purpose of relocating the entire antenna on the property in order to circumvent the intentions of this section.
6. Technological impracticality: basis for waiver. In the event that the strict application of the provisions of this zoning code would make it impossible for satellite television antenna upon any lot in the City, to receive a usable satellite signal, or in the event that the property owner believes that

alternatives exist which are less burdensome to adjacent property owners, the property owner may make application to the Hearing Examiner for a waiver from these provisions. The Hearing Examiner may grant such a waiver upon findings that either:

a. Technological impracticality:

- 1) Actual compliance with the existing provisions of the City's zoning ordinance would prevent the satellite television antenna from receiving a usable satellite signal, and
- 2) The alternatives proposed by the property owner constitute the minimum necessary to permit acquisition of a usable satellite signal by the satellite television antenna.

In granting the waiver, the Hearing Examiner is ordered to impose such conditions as may be necessary to place the minimum burden on adjacent property owners, such conditions may include but are not limited to requirements for screening and landscaping, review of the color and reflectivity of the proposed satellite television antenna, and any other reasonable restriction consistent with the intent of the City Council that this waiver be used only as the minimum necessary to permit the satellite television antenna to acquire a usable satellite signal while preserving the aesthetic harmony of the community. In exercising the power herein granted, the Hearing Examiner is instructed to preserve the technical operation of the satellite television antenna in order that it may secure a usable

satellite antenna while imposing such conditions as may be necessary to have that antenna blend into its surroundings.

- b. Less burdensome alternatives. The Hearing Examiner is also authorized to consider the application of property owners for waivers consistent with the provisions of subsection (a) above without requiring a finding that no usable satellite signal can be acquired when the applicant establishes that the alternatives proposed by the applicant are less burdensome to the abutting property owners than the requirements imposed by the provisions of this section.
- c. The application fee and notification for the consideration of the waiver shall be the same as that provided for processing a variance.
- d. In the event that an applicant for waiver is also obligated to obtain Architectural Design Review, the Architectural Design Board shall defer to the Hearing Examiner. The Hearing Examiner may, at his/her discretion request Architectural Design Board review and comment in order that a required screening and landscaping may be integrated into site and landscaping plans. No additional fee shall be required of the applicant upon such referral. [Ord. 2526 §3, 1985; Ord. 2268 §1, 1982.]

CHAPTER 16.30

RM - MULTIPLE RESIDENTIAL

16.30.000 PURPOSES

The RM zone has the following specific purposes in addition to the general purposes for residential zones of Section 16.00.010 and 16.10.000:

- A. To reserve and regulate areas for a variety of housing types, and a range of greater densities than are available in the single-family residential zone, while still maintaining a residential environment.
- B. To provide for those additional uses which complement and are compatible with multiple residential uses.

16.30.010 USES

A. Permitted Primary Uses.

- 1. Multiple dwellings.
- 2. Single-family dwellings.
- 3. Retirement homes.
- 4. Boarding houses and rooming houses.
- 5. Housing for the elderly in accordance with the requirements of Chapter 20.25.
- 6. Bus stop shelters.

B. Permitted Secondary Uses.

- 1. All permitted secondary uses in the RS zone, if in conjunction with a single-family dwelling.
- 2. Home occupations, subject to the requirements of Chapter 20.20.

3. The keeping of one domestic animal.
4. The following accessory uses:
 - a. Private parking.
 - b. Private swimming pools and other private recreational facilities.
 - c. Private greenhouses covering no more than five percent of the site in total.

C. Primary Uses Requiring a Conditional Use Permit.

1. Offices.
2. Community facilities, including buildings used for community activities and services, and operated by public, quasi-public or nonprofit agencies or groups, such as:
 - a. Schools, colleges, universities.
 - b. Preschools, day care centers.
 - c. Hospitals, convalescent homes, rest homes, sanitariums.
 - d. Churches, temples, synagogues.
 - e. Fire houses, police stations.
 - f. Electric substations, pumping stations, water storage, drainage facilities, transmitting and receiving antennas.
 - g. Parks, playgrounds, pools, golf courses, tennis clubs, lodges.
 - h. Museums, libraries, art galleries, zoos, aquariums, planetariums.
 - i. Group homes, halfway houses, counseling centers.

D. Secondary Uses Requiring a Conditional Use Permit.

1. Family day care homes.
2. Mini-day care facilities, provided that:
 - a. Mini day care facilities shall not be operated from or within a multiple family dwelling unit or combination of units, but
 - b. A permit may be issued for a mini day care facility to be operated in a separate, non-residential portion of a multi-family residential dwelling structure operated primarily for the benefit of the residents thereof.

[Ord. 2673 §2 (1988); Ord. 2458 §2, 1984; Ord. 2283 §3, 1982; Ord. 2283 §2, 1982.]

16.30.020 SUBDISTRICTS

There are established three subdistricts of the RM zone, in order to provide site development standards for areas which differ in topography, location, existing development and other factors. These subdistricts shall be known as the RM-1.5, RM-2.4, and RM-3 zones.

16.30.030 SITE DEVELOPMENT STANDARDS

A. Table.

SUB DIS- TRICT	MINIMUM LOT AREA PER DWELLING UNIT ⁴ (Square feet)	MINI- MUM SIDE SET- BACK		MINI- MUM REAR SET- BACK	MAXIMUM HEIGHT ^{1,5}	MAXIMUM COVER- AGE (%)	MINIMUM ³ PARKING (Spaces per unit)
		MINIMUM STREET SETBACK	MINI- MUM SIDE SET- BACK				
RM-1.5	1,500	15'	10'	15'	25'	45%	2
RM-2.4	2,400	15'	10'	15'	25'	45%	2
RM-3	3,000	15' ²	15' ²	15'	25'	45%	2

¹ Roof only may extend five feet above the stated height limit if all portions of the roof above the stated height limit have a slope of 4" in 12" or greater.

² RS setbacks may be used for single family homes on lots of 10,000 sq. ft. or less in all RM zones.

³ See Chapter 17.50 for specific parking requirements.

⁴ See definition of townhouse.

⁵ Maximum height for accessory structures if 15'.

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B. Signs and Design Review. See Chapter 20.10 and 20.60 for regulations.

C. Location of Parking. No parking spaces may be located within the street setback. [Ord. 2559, 1986; Ord. 2424, 1984].

16.30.040 SITE DEVELOPMENT EXCEPTIONS

A. Housing for the Elderly. Housing projects for the elderly are eligible for special parking and density provisions. See Chapter 20.25.

B. Setback Adjustments. Chapter 20.50 contains a procedure for adjusting setback distances and locations in special situations.

C. Satellite Television Antenna. Satellite television antennas shall be regulated as set forth in Section 16.20.050 and reviewed by the Architectural Design Board.

D. Setback Encroachments. Eaves and chimneys may project into a required setback not more than 30 inches. Uncovered and unenclosed porches, steps, patios, and decks may project into a required setback not more than one-third (1/3) of the required setback, or four feet, whichever is less, provided that they are no more than 30 inches above the ground level at any point.

E. Corner Lots. Corner lots shall have no rear setback; all setbacks other than the street setbacks shall be side setbacks. [Ord. 2559, 1986; Ord. 2526 §4, 1985.]

CHAPTER 16.40
BUSINESS AND COMMERCIAL ZONES - PURPOSES

16.40.000 PURPOSES

The general purposes of the Business and Commercial (B or C) zones are:

- A. To provide for areas for commercial uses offering various goods and services according to the different geographical areas and various categories of customers they serve.
- B. To provide for areas where commercial uses may concentrate for the convenience of the public and in mutually-beneficial relationships to each other.
- C. To provide for residential uses, community facilities and institutions which may appropriately locate in commercial areas.
- D. To require adequate landscaping and off-street parking and loading facilities.
- E. To protect commercial uses from hazards such as fire, explosion and noxious fumes, and also nuisances created by industrial uses such as noise, odor, dust, dirt, smoke, vibration, heat, glare and heavy truck traffic.

CHAPTER 17.00
ADMINISTRATION

17.00.000 APPLICABILITY

All provisions of this title apply throughout the city, with no variation by zone district, unless otherwise specified in this title.

17.00.010 ZONING MAP

The locations and boundaries of zone districts shall be as shown on that map entitled "Official Zoning Map, Edmonds, Washington" which map shall reference the zoning districts set forth in Chapter 16 (Zoning Districts). The Official Zoning Map, together with all information shown on the map, is adopted by this reference as if it were set forth in this chapter in full. The City Clerk shall keep the Official Zoning Map on file for public inspection. The map shall be attested by the Mayor and City Clerk, and may be amended pursuant to Chapter 20.40 (Rezoning).

17.00.020 BOUNDARIES

The following rules apply to interpretation of the Official Zoning Map:

- A. Established Lines. Where boundaries are shown along street lines, alley lines or lot lines, those lines are the boundaries.
- B. Other Lines. Boundaries not shown along other established lines shall be dimensioned.

- C. Vacations. When the City vacates a street or alley, the zone districts along either side shall be extended to the centerline of the vacated street.
- D. Unclassified Land. All lands not classified according to the established district classifications on the official zoning map shall be classified as RS-12, pending study, public hearing and specific classifications.
- E. Annexed Land. The zoning classification of all land annexed to the City shall be determined at the time of annexation and after two public hearings held at least thirty days apart as required by state law, except when the appropriate zoning cannot be determined without further study and/or public comment. All land annexed to the City and not simultaneously zoned shall be considered tentatively as having a zoning classification that is the nearest and most similar to the classification such property enjoyed under county zoning, pending study, public hearing and specific classifications. [Ord. 2291 §1, §2, 1982.]

17.00.030 APPLICATION OF REGULATIONS

- A. Code Compliance Required. All land in the city shall be used, and all buildings shall be built, structurally altered, or moved onto a site, only in compliance with all regulations of this zoning ordinance.
- B. Setbacks – Density.
 - 1. Any setback, yard, minimum lot size, or open space required by this zoning ordinance for one use may not be used to meet minimum requirements of this zoning ordinance for any other use.
 - 2. When an existing lot is subdivided, or is the subject of a lot line adjustment, the new lot lines

will not make any existing improvements non-conforming to the regulations of this zoning ordinance.

- C. Public Structures and Uses. All public structures and uses built or altered by the city or any other public agency shall comply with this zoning ordinance. Where it is a public necessity to build, or alter, a structure or use in a location or in a manner not complying with this zoning ordinance, a variance may be considered. In this case, the action of the Hearing Examiner shall be a recommendation to the City Council.

17.00.040 ENFORCEMENT

- A. Penalties. A violation of any provision of the Community Development Code or any provision of any code adopted in this code by reference shall be a misdemeanor. If a violation is committed, continued or permitted for more than one day, each day or portion of a day shall be a separate offense. A convicted person shall be punished as set forth in Chapter 5.50 (Penalties).
- B. Other Remedies. The City may begin civil or criminal action(s) to restrain and/or enjoin any violation of this code, and to obtain other injunctive or legal relief. The violator shall pay the costs of such action including reasonable City attorney fees.

17.00.050 PRIOR LAND USE REGULATIONS AND MAPS

The city clerk is hereby directed to file for permanent record a copy of the following prior land use regulations and maps:

- A. That compilation entitled "City of Edmonds Land Use Regulations," published October 1, 1978, consisting of Title 12 (Zoning and Platting), and Title 20 (Sign Code), as the same has been amended through the end of the year 1980.
- B. The "Official Zoning Map, Edmonds, Washington," adopted by Ordinance No. 1074 in 1964, and as amended from time to time through the end of the year 1980.

The above referenced ordinances and zoning map are hereby superseded by the adoption of the Edmonds Community Development Code and the new Official Zoning Map, Edmonds, Washington, adopted by Section 17.00.010 herein. In the event any portion of this Community Development Code, or any map, plan, diagram, chart, code, or any other matter adopted herein by reference and/or by direct text, including but not limited to the new Official Zoning Map, Edmonds, Washington, is for any reason whatsoever held invalid or inapplicable to any person or property within the jurisdiction of the City, then that portion of the provision, map, plan, diagram, chart, text or code shall be deemed repealed and the prior applicable provisions shall be deemed revived and applicable in full force and effect as if it or they had not been previously superseded by this code. The preceding ordinances, maps, plans, diagrams, charts and codes that are so superseded and may be revived include those specifically referenced in subparagraphs A and B above, and in addition the entire Edmonds City Code as the same was in effect at the end of 1980, and all ordinances of the City of Edmonds of which it was composed as the same are on file with the city clerk.

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CHAPTER 19.10

HOUSING CODE

19.10.000 HOUSING CODE ADOPTED

The Uniform Housing Code, 1988 Edition, as published by the International Conference of Building Officials including all appendices is hereby adopted as the "Housing Code for the City of Edmonds" subject to the amendments made herein. [Ord. 2725, 1989; 2574 Section 2, 1986.]

19.10.010 CONTINUING VIOLATION

Maintenance of equipment which was unlawful at the time it was installed and which would be unlawful under this code if installed after the effective date of this code, shall constitute a continuing violation of this code and the preceding code under which it was initially unlawful.

CHAPTER 21.00
DEFINITIONS - GENERAL

21.00.000 GENERAL

- A. Normal Meanings. For the purpose of the Community Development Code, all words used in the Code shall have their normal and customary meanings, unless specifically defined otherwise in this code.
- B. Rules
1. Words used in the present tense include the future.
 2. The plural includes the singular, and vice versa.
 3. The words "shall" and "may not" and "no — may" are mandatory.
 4. The word "may" indicates that discretion is allowed.
 5. The word "used" includes "designed, intended or arranged" to be used.
 6. The masculine gender includes the feminine and vice versa.
 7. Distances shall be measured horizontally unless otherwise specified.
 8. The word "building" includes a portion of a building or lot.
- C. Adopted Codes. Where a code or codes have been adopted by reference or incorporation which may contain a definition or definitions conflicting with those set forth in this Chapter, for the purpose of that particular referenced or incorporated code, and only that code, the definition therein shall prevail.

- D. Cross References. Sections which make only cross-reference to another term are not intended to be synonymous with the other term, but are only intended to serve as a finding aid to the other term unless specifically stated to mean the same.

* * *

CHAPTER 21.30
"F" TERMS

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

21.90.080 SINGLE FAMILY DWELLING (UNIT)

Single family dwelling (and Single Family Dwelling Unit) means a detached building used by one family, limited to one per lot.

No. 94-23

Supreme Court, U.S.

FILED

DEC 15 1994

OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING
CODE COUNCIL, et al.,

Respondents,

and

UNITED STATES OF AMERICA.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

W. SCOTT SNYDER*
OGDEN MURPHY WALLACE
2100 Westlake Center Tower
1601 5th Avenue
Seattle, WA 98101
(206) 447-7000
*Counsel of Record

4197

QUESTION PRESENTED

Is traditional single-family zoning patterned on the decisions of the United States Supreme Court exempt from coverage under the Fair Housing Act Amendments as a reasonable local restriction on the maximum number of occupants permitted to occupy a dwelling where there is no evidence of an intent to discriminate against the disabled and reasonable provision is made in other zoning districts for group home uses?

PARTIES TO THE PROCEEDING

City of Edmonds, Washington
 United States of America
 Oxford House-Edmonds
 Oxford House, Inc.
 Herb Hamilton
Parties Dismissed¹

¹ The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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CITATIONS OF OPINIONS AND JUDGMENTS

1. Judge William L. Dwyer of the United States District Court, the Western District of Washington, entered an Order on Cross Motions for Summary Judgment in favor of the City of Edmonds and against the named defendants in the original action and the United States of America as plaintiff in the consolidated action on July 15, 1992. *City of Edmonds v. Washington State Building Code Council, et al.*, Nos. C91-215WD, C91-1273WD W.D. Wash (July 15, 1992); see Petition for Certiorari, Appendix B.

2. The decision of the District Court was reversed by Circuit Court Judges Eugene A. Wright, William C. Canby, Jr. and Thomas G. Nelson of the United States Court of Appeals for the Ninth Circuit on March 14, 1994. *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802 (9th Cir. 1994), cert. granted, 115 S. Ct. 417 (1994); see Petition for Writ of Certiorari, Appendix A.

GROUND FOR JURISDICTION

Jurisdiction is conveyed to the Court to review the judgment of the Ninth Circuit under 28 U.S.C. § 1254 and Sup. Ct. R. 10.1(a).

STATUTE AND ORDINANCE SECTIONS RELIED ON

42 U.S.C. § 3607(b)(1) creates an exemption from the Fair Housing Act and Fair Housing Act Amendments:

Section 3607. Exemption.

.....

(b) Numbers of occupants . . .

(1) [n]othing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

At issue is whether the following provisions of the City of Edmonds, Washington Community Development Code (hereinafter "ECDC") constitute such a reasonable occupancy limitation. ECDC Section 16.20.010 USES defines those uses permitted in a single-family residential zone:

16.20.010 USES

A. Permitted Primary Uses.

1. Single-family dwelling units.

B. Permitted Secondary Uses.

1. Foster homes.
2. Home occupation, subject to the requirements of Chapter 20.20.
3. The renting of rooms without separate kitchens to one or more persons.
4. The keeping of three or fewer domestic animals.
5. The keeping of horses, subject to the requirements of Chapter 5.05.
6. The following accessory buildings:

- a. Fallout shelters.
- b. Private greenhouses covering no more than five percent of the site.
- c. Private stables.
- d. Private parking for no more than five cars.

ECDC Section 21.30.010 FAMILY defines "family" for the purposes of the "use" provisions of the code:

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

STATEMENT OF THE CASE

The City of Edmonds, Washington (hereinafter "City") has enacted a comprehensive plan and zoning code pursuant to the authority granted it under the laws of the State of Washington. Wash. Rev. Code Ch. 35A.63 (1989 & Supp. 1990). The ECDC sets aside a portion of the City exclusively for single-family residential use and provides other districts for multiple family residences, commercial, light industrial and other uses.

This dispute began during the summer of 1990. Mark Spence, a representative of Oxford House, Inc., the national parent organization of Oxford House-Edmonds,

came to the Puget Sound area on behalf of his organization to establish a self-governing group residence for recovering alcoholics and drug addicts. Mr. Spence reviewed the houses advertised for rent in the July 6, 1990 edition of the *Seattle Times*. Jt. App. at 91, 94. He selected a rental in Edmonds, Washington and leased the residence at 8704 - 216th Street S.W., Edmonds, Washington from defendant Herb Hamilton. Jt. App. at 103, 106. Mr. Spence did not review the zoning classification of the residence prior to leasing it. Jt. App. at 91. The house was the first residence about which he inquired. Jt. App. at 94.

Prior to occupancy of the recovery house, Mr. Spence distributed literature describing Oxford House's operation to its neighbors. Jt. App. at 43, 63. The literature described Oxford House's program including the need (in Oxford House's experience) for approximately 8 to 12 residents in order to provide an adequate economic base to enable the recovery house to be self-sufficient. Jt. App. at 107. After receiving the Oxford House literature, neighbors filed complaints with the City's zoning officials. Jt. App. at 44.

The City's code enforcement officer investigated the complaints by inspecting the house with the permission and in the presence of an Oxford House representative. Jt. App. at 45. Based upon his inspection, the code enforcement officer found that more than five unrelated adult individuals were living in the house. Jt. App. at 45. The enforcement officer referred the matter to the city attorney's office for prosecution as a code violation. Jt. App. at 45. The City filed misdemeanor charges in municipal

court against Mr. Spence, the Oxford House representative and Herb Hamilton, the owner of the house. These individuals in turn filed complaints with the U. S. Department of Housing and Urban Development (hereinafter "HUD") alleging violation of the Fair Housing Act Amendments (hereinafter "FHAA"). Jt. App. at 45, 64. Following contact by a HUD investigator City officials voluntarily withdrew the charges and have taken no further enforcement action pending final resolution by this Court.

The City then initiated a declaratory judgment action against the Oxford House defendants, HUD and the State Building Code Council. The City also initiated review of its Community Development Code in order to assess its accommodation of the local Oxford House facility (hereinafter "Oxford House-Edmonds") and other congregate living arrangements of disabled persons. The City repealed sections which required a conditional use permit for group homes for the disabled in multi-family zones because of its concern that a conditional use permit requirement conflicted with the principles established in the *City of Cleburne, Tex. v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). The City's amendments opened one-quarter of the City's rental housing stock or 186 single-family residences for group home use as a matter of right. The City's planning policies encourage the development of treatment facilities, housing for the disabled and group home uses. Jt. App. at 109-110, 113.

At the District Court the United States government requested dismissal of the United States governmental defendants. The District Court granted the motion. Six

months later, the Department of Justice initiated a separate civil action against the City alleging violations of the Fair Housing Act and Fair Housing Act Amendments. The two actions have been consolidated. In order to present a more straightforward issue to the District Court, the parties entered into voluntary dismissals of the City of Everett, Washington, the Washington State Building Code Council and Oxford House-Hoyt (an Oxford House facility in the City of Everett, Washington).

SUMMARY OF ARGUMENT

The City of Edmonds maintains a system of zoning similar to that in place in the majority of communities throughout the country. The basic building block of any zoning scheme is the single-family zone. A single-family zone permits as a matter of right families related by blood or marriage to reside in individual residences as well as groups of five or fewer unrelated adults. The record shows no intent on the part of the City to discriminate. Reasonable provision is made elsewhere in the community for group home uses. The City's zoning system is based on and similar to zoning schemes approved as reasonable on constitutional grounds by the U. S. Supreme Court.

Oxford House and the United States allege that the City's zoning scheme violates the FHAA because the consensual living arrangement of 10 to 12 recovering drug addicts and alcoholics is excluded from the single-family zone. Group homes for the disabled and consensual living arrangements are permitted within all other

zoning districts of the City, many of which include single-family homes in neighborhood settings indistinguishable from that chosen by Oxford House. The zoning system is alleged to be discriminatory solely because the number of unrelated adult disabled persons who may reside in a single-family zoned residence is limited to five while any number of related family members may live within a similar residence provided the residence meets Uniform Housing Code (hereinafter "UHC") square footage standards. The City believes that its single-family zoning scheme is a reasonable local restriction regarding the maximum number of occupants permitted to occupy a dwelling and, therefore, exempt from Fair Housing Act coverage.

The decisions of the U. S. Supreme Court afford a special status to the family. The basic building block of American zoning is the single-family neighborhood. The U. S. Supreme Court's decisions establish that police powers exercised by a city in a zoning code may protect the sanctity of the family, nuclear and extended, as an institution by providing it a preferred and protected place within the community. Such protections are upheld by the U. S. Supreme Court as reasonable under constitutional scrutiny.

The City believes the occupancy exemption applies to the City for three different reasons. First, the long history of single-family zoning before the U. S. Supreme Court has recognized and specifically designated single-family zoning to be a reasonable limitation regarding the maximum number of occupants permitted to occupy a dwelling. Congress is presumed to know that history when using the terms "reasonable local . . . restriction" and "the

maximum number of occupants permitted to occupy a dwelling." Second, application of the plain meaning doctrine supports the City's single-family zone as a reasonable occupancy limit. Third, the legislative history of the FHAA indicates the intention of Congress to provide equal housing opportunities for disabled persons, not the freedom to ignore traditional, reasonable and facially neutral zoning ordinances. The FHAA prohibit a city from establishing special requirements applicable only to the disabled based upon their disability, and do not overrule the basic building block of single-family zoning by implication alone.

ARGUMENT

The City of Edmonds has a classic Euclidian zoning scheme similar to 100 or more cities in the state of Washington and thousands throughout our nation. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). The City's definition of family mirrors the language approved by the U. S. Supreme Court in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). It extends the benefits and protections of its single-family zone to the extended family following the direction of the U. S. Supreme Court in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494 (1977). Finally, it does not apply one set of occupancy limitations to handicapped individuals and another set to families and other groups of unrelated persons in violation of the precepts set forth in *City of Cleburne, Tex. v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985) or the intent of Congress in enacting the FHAA.

A. THE DECISIONS OF THE UNITED STATES SUPREME COURT AFFORD THE FAMILY A SPECIAL STATUS UNDER THE CONSTITUTION

The appellees, the Ninth Circuit Court of Appeals and the dissenting judge in *Elliott v. Athens, Ga.*, 960 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992), all make the same error. They confuse the classification of uses and designation of uses to specific zones within the city for discrimination. Zoning by its very nature is concerned with classifying different types of uses into appropriate zoning districts. 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.07 (3d ed. 1991). Constitutional zoning which complies with federal discrimination laws is concerned with the characteristics of the use and not the race, gender or disability of the individuals who reside or work within the zoning district. See Mark Stanton Thomas, *Exclusionary Zoning and The Reluctant Supreme Court*, 13 Wake Forest L. R. 107 (Spring 1977).

Zoning is an exercise of a city's police powers and the basic building block of zoning structure is the single-family zone. A picture of the zone was described well by Justice Douglas:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs The police power is not confined to the elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

Belle Terre, 416 U.S. at 9.

From its very inception, zoning was created as a tool to set aside and protect a residential area for the exclusive use of families. *Euclid*, 272 U.S. 365 (1926). While sometimes cited as a limitation on city's zoning powers, the *Moore* decision is in reality a reaffirmation of the "private realm of family life." *Moore*, 431 U.S. at 499. The plurality in that decision and, indeed, the dissenting justices, place great importance on the "preferred position in the law" of the family. *Id.* at 511. As the Court noted:

Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural.

Id. at 503-04. *Moore* requires that the benefits of the single-family zone be offered to the extended family and not limited to the nuclear family. *Id.* at 504-05. *Belle Terre* affirms the power of local zoning authorities to limit the extension of those benefits to unrelated adults in order to preserve and protect the resource. Each of these decisions has judged the exercise of zoning authority under the constitutional reasonableness standard of the Fourteenth Amendment Due Process and Equal Protection clauses.

The U. S. Supreme Court's decisions give great deference to the reasonable decision-making authority of local zoning officials to make fine distinctions between uses. *Euclid* dealt at length with a city's ability to differentiate between very similar residential uses, preserving one zone for families by excluding similar but related uses, such as the residences of unrelated adults in apartment and rooming houses. *Euclid*, 272 U.S. at 394-95.

From the City's perspective, the sole issue is whether by enacting the FHAA Congress intended to overturn Euclidian zoning and thereby the definition of family approved as reasonable by the U. S. Supreme Court. The City believes that the exemption for reasonable occupancy limitations must be interpreted in the context of the U. S. Supreme Court's consistent direction in the field of single-family zoning.

B. EDMONDS SINGLE-FAMILY ZONING DEFINITION IS EXEMPT AS A REASONABLE OCCUPANCY LIMIT

The FHAA exempts reasonable local occupancy limitations at 42 U.S.C. § 3607(b)(1). Appellees and the Ninth Circuit believe that the City's ordinance is neither reasonable nor an occupancy requirement. There are three distinct reasons why they are wrong.

When Congress used the terms "reasonable" and "occupancy", it did so in light of the well established history of U. S. Supreme Court cases upholding the reasonableness of single-family zoning ordinances under constitutional principles and classifying the ordinances as "occupancy" limits. As the U. S. Supreme Court has said:

In sum, it is not only appropriate but also realistic to presume that Congress was thoroughly familiar with these unusually important precedents from this and other federal courts and that it expected its enactment to be interpreted in conformity with them.

Cannon v. University of Chicago, 441 U.S. 677, 699 (1979).

1. Single-Family Zoning as an Occupancy Limitation Under Federal Law

After the *Euclid* case, the U. S. Supreme Court did not hear a significant zoning case for almost 50 years. The U. S. Supreme Court's pattern of single-family zoning decisions clearly categorizes the definition of family as an occupancy limit. As any reasonable reading of *Euclid* and *Moore* shows, use regulations are the first and still most prevalent form of occupancy limit.

Well known zoning experts lump all zoning regulations together as use restrictions. 8 Eugene McQuillin, *The Law of Municipal Corporations* § 25.119 (3d ed. 1991), discusses the full spectrum of zoning regulations in "use control." More importantly, the Washington statutes which confer zoning authority on the City do not make the distinction urged by Appellees. The City's zoning power originates in Wash. Rev. Code RCW 35A.63.100(2) (1989 & Supp. 1990). This section of state statute allows a city such as Edmonds to enact ordinances that provide for:

Dividing the municipality, or portions thereof, into appropriate zones within which specific standards, requirements, and conditions may be provided for regulating the use of public and private land, buildings, and structures, and the location, height, bulk, number of stories, and size of buildings and structures, size of yards, courts, opens spaces, density of population, ratio of land area to the area of buildings and structures, setbacks, area required for off-street parking, protection of access to direct sunlight

for solar energy systems, and such other standards, requirements, regulations, and procedures as are appropriately related thereto. The ordinance encompassing the matters of this subsection is hereinafter called the "zoning ordinance" . . .

Wash. Rev. Code § 35A.63.100(2). Washington decisions and statutes do not differentiate the term "use" regulation from bulk, density or occupancy regulation but rather utilize the term "use" regulation as an umbrella under which various zoning powers and techniques including occupancy limitation are exercised.

In prior argument, appellees asserted that the existence of the UHC represents an acknowledgment by the City that its zoning scheme is not an occupancy restriction. As authority, they cite *Moore*, 431 U.S. at 520 n.16. A closer reading of *Moore* not only fails to support this position, but shows that East Cleveland's ordinance was clearly categorized by the U. S. Supreme Court as an occupancy limit. Justice Stevens' summary of East Cleveland's zoning structure in *Moore* accurately summarizes Edmonds' ordinance because Edmonds' provision has exactly the same structure as the ordinance at issue in East Cleveland:

Litigation involving single-family zoning ordinances is common. Although there appear to be almost endless differences in the language used in these ordinances, they contain three principal types of restrictions. First, they define the kind of structure that may be erected on vacant land. Second, they require that a single-family home be occupied only by a "single housekeeping

unit." Third, they often require that the house-keeping unit be made up of persons related by blood, adoption or marriage, with certain limited exceptions.

Although the legitimacy of the first two types of restrictions is well settled, attempts to limit occupancy to related persons have not been successful.

Moore, 431 U.S. at 515-16. (Emphasis added). The dissent in *Moore* also classified the ordinance as an occupancy limitation. *Id.* at 537. As Justice Stevens noted zoning ordinances assign uses to districts and control the occupancy and use of lots and structures. Housing codes such as those in place in East Cleveland and Edmonds provide additional regulation to plan an upper limit on the structures based upon the square footage of the living areas. The two types of regulation are not mutually exclusive but complementary, addressing different but equally valid local interests.

For example, assume a single-family house in Edmonds has square footage that would allow a total of eight adults under the UHC. Any number of related family members could reside there, up to eight. If a family decided to let rooms, a permitted use, the total number of residents would again be limited to five. *Jt. App.* at 225. Only one primary residence may be erected on the lot, however, accessory dwelling units are permitted with a conditional use permit. *Jt. App.* at 225-226. In this case the number of residents permitted is limited by the total square footage of the structures and by their relationship. The interplay of the definition of family and the UHC square footage limits are employed in concert to limit the overall residential use of both the lot and the structure or structures on it.

2. Statutory Language of Exemption Includes Single-Family Zoning as an Occupancy Limit

The second reason the Edmonds' single-family zoning should be classified as a reasonable local occupancy restriction is the plain meaning of the terms employed in the exemption. The plain meaning rule is a fundamental canon of construction: unless otherwise defined, words will be interpreted as taking their ordinary, contemporary and common meaning. *Perrin v. United States*, 444 U.S. 37, 42 (1979). The sole function of a court is to enforce a statutory phrase according to its terms. Where the phrase is unambiguous – has a clearly accepted meaning in both legislative and judicial practice – that phrase may not be expanded or contracted by statements of individual legislators or committees during the course of the enactment process. *West Virginia Univ. Hospitals, Inc. v. Casey*, 499 U.S. 83, 98-99 (1991). When words of a statute are unambiguous, the court should not look at legislative history. *Connecticut Nat'l Bank v. Germain*, 112 S. Ct. 1146 (1992). In construing a statute, the task of the Supreme Court is to give effect to the will of Congress and where its will has been expressed in reasonably plain terms, that language must ordinarily be regarded as conclusive. *Negonsott v. Samuels*, 113 S. Ct. 1119 (1993).

Where Congress uses terms that have an accumulated, well settled meaning under either equity or common law, the court must infer that Congress meant to use the established, settled meaning. *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 329 (1981), *reh'g denied*, 453 U.S. 950 (1981). As noted, the terms employed have a distinct and settled meaning under the U. S. Supreme Court's zoning

decisions. There are also dozens of cases in the common law that define the term "occupant." See 29 *Words and Phrases*, "occupant; occupier" (West Publishing Co. 1972). As one would expect, in all real property cases concerning the interpretation of the term "occupant," a person is termed an occupant of that property if he or she has some specified relationship to the land. See, e.g., *Smith v. Sno Eagle Snowmobile Club*, 823 F.2d 1193 (7th Cir. 1987) ("occupant" for purposes of statute granting immunity to "owner, lessee or occupant" held to mean one who has actual use of property without legal title, dominion or tenancy.); *United States v. Fountain*, 2 F.3d 656, 663 (6th Cir.), cert. denied, 114 S. Ct. 608 (1993) ("occupant" for purposes of occupants that may be searched incident to search of premises under Supreme Court ruling is any individual whose connection to the searched premises appears to be more than that of an obviously chance visitor.); *King v. Yancy*, 53 F. Supp. 510, 512 (D.C. Nev. 1944) rev'd on other grounds, 147 F.2d 379 (9th Cir. 1945) (an "occupant" of a premises within the rule of an occupant's liability for injuries to an invitee is one in possession of the premises by the owner's authority). It is clear that the term "occupant" is not a term that has been exclusively appropriated by building codes. In cases involving real property, the definition of "occupant" relies upon the relationship a person has to property. Consequently, if the Court looks beyond its own decisions regarding zoning the Court should also infer that Congress meant to use the settled meaning of occupant. The use of either approach yields the same result.

The District Court in this case and the majority in *Elliott* relied on the plain meaning of the exemption.

Their reasoning included the long U. S. Supreme Court history in the area of single-family zoning. The dissent in *Elliott* and the Ninth Circuit fall under the trap of collapsing the exemption and reading the term "reasonableness" in the exemption as equivalent to the reasonable accommodation standard of the statute. To do so destroys the exemption.

3. Legislative History Supports Exemption of Single-Family Zoning.

The purpose of the FHAA is to guarantee "equal opportunity" in housing to disabled persons. 42 U.S.C. 3604(f)(3)(B); Jt. App. at 130-131. The FHAA seeks to mainstream individuals and avoid stereotyping. Jt. App. at 134-136. The Appellees and the Ninth Circuit fall into the trap of stereotyping, albeit for the best of reasons. Zoning powers are exercises of the police powers designed to protect the special resource of single-family zoning. Appellees' argument assumes that disabled persons will not have the same failings as others and require local zoning scrutiny. As an individual, a disabled person could be a slumlord, an unscrupulous developer or make inappropriate or illegal use of his or her property. While the Appellees assume this benign stereotype, this view is certainly not mainstreaming.

The Ninth Circuit, in its decision, was concerned that exempting traditional single-family zoning from the FHAA would give broad protection to the majority of cities' ordinances. This protection would prohibit a court from considering a disabled person's claim that they were

excluded from a community, thereby thwarting the legislative goal of mainstreaming. This argument is flawed. The exemption contains the word "reasonable." A court may, therefore, make an initial inquiry into whether a city's zoning ordinance is "reasonable." For example, assume that a community adjacent to the City of Edmonds (also a bedroom community) has a zoning scheme consisting solely of single-family zoning. In that community, the traditional definition of single-family would not be reasonable as it would result in the total exclusion of the group homes for the disabled from the community. Therefore, how the definition of family is applied may still be considered by the courts under the FHAA even if the City's zoning structure is held exempt. In this case all other zoning districts of the City are available for group home use and adequate housing stock is available in them. Jt. App. at 122. The disabled have an equal opportunity to housing as mandated by Congress, but also have the same obligations applicable to other persons under reasonable zoning laws. This demonstrates that the City's zoning structure adequately fosters the goal of mainstreaming and individualization which was the goal of the FHAA.

The Act and Joint Committee comments taken as a whole demonstrate that Congress made a special effort in the Amendments to defer to the extended family in the same manner which the U. S. Supreme Court did in *Moore*. The Amendments and its comments recognize the special status of the family in its distinction between marital status and familial status. The Joint Committee report states that the Acts protection of families does not extend to consensual living arrangements:

The Committee does not intend this definition [familial status] to include marital status.

Jt. App. at 146. Family is defined much in the same manner as the Court did in *Moore* by referring to a person with a child. Therefore, the assertion that some unrelated adults, i.e., unmarried individuals living in consensual living arrangements, must have the same rights under the Act as a biological or extended family, is untenable in the light of the overall structure of the Fair Housing Act.

Appellees have asserted below that the only acceptable occupancy limitations are those which limit the number of occupants of a structure based on square footage. While it is true that the House Committee commented favorably in its report on such limitations, the specific references to the exemption show that Congress was trying to address a problem not present in the City's zoning structure. In the Joint Committee's Report the potential for local abuse is reviewed:

These new subsections would also apply to state or local land use in health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have the authority to protect the safety and health, to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps who live in cities. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). This has been accomplished by such means as the enactment or imposition of health, safety or land use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements have

not been proposed on *families and groups of similar size of other unrelated people*, these requirements have the affect of discriminating against persons with disabilities.

Jt. App. at 147-148 (emphasis added). The use of the phrase "[f]amilies and groups of similar size of unrelated persons . . ." makes it clear that Congress was trying to adopt a standard which addressed the problem referenced in the *City of Cleburne* case. The use of the conjunctive "and" rather than "or" serves to emphasize that aim.

In *City of Cleburne*, the U. S. Supreme Court invalidated an ordinance which required homes for the mentally disabled to obtain a special use permit in order to locate in a multi-family zone while permitting a wide variety of other multi-family or high occupancy uses:

The constitutional issue is clearly posed. The city does not require a special use permit in an R-3 zone for apartment houses, multiple dwellings, boarding and lodging houses, fraternity or sorority houses, dormitories, apartment hotels, hospitals, sanitariums, nursing homes for convalescents or the aged (other than for the insane or feeble-minded or alcoholics or drug addicts), private clubs or fraternal orders, and other specified uses. It does, however, insist on a special permit for the Featherstone home and it does so, as the District Court found, because it would be a facility for the mentally retarded. May the city require the permit for this facility when other care and multiple-dwelling facilities freely permitted?

City of Cleburne, 473 U.S. at 447-48. The Court in *City of Cleburne* an equal protection case, reviewed whether

"similarly situated" persons were subject to the same restrictions and rights under the law. *Id.* In *City of Cleburne*, a disabled group home was required to obtain a conditional use permit while other rooming houses or fraternity houses were not.

The City's zoning structure, however, permits larger groups of unrelated adults to locate as a matter of right in the same zones as similarly situated groups and uses. No special requirements or use permits are necessary. Further, smaller groups of disabled persons desiring to live together, as well as families with disabled members, are welcome in the single-family zone. This allows mainstreaming in a way that does not abrogate traditional single-family zoning.

42 U.S.C. § 3607(b)(1) allows a City to enact reasonable zoning ordinances containing limits on occupancy. The language referring to a "minimum number of square feet in the unit or the sleeping areas of the unit" is illustrative of one method used by some municipalities to regulate density. It does not purport to be an exclusive method of regulation, nor is an ordinance per se unreasonable if it is not based on square footage or number of bedrooms.

This point is emphasized in the Joint Committee Report:

A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit.

Jt. App. at 163 (emphasis added). The language used is instructive. "A number" is a long way from "most", a

"majority" or even a "substantial number"; yet Appellees would have this Court infer that Congress intended to invalidate the majority of single-family zoning occupancy limits on the basis of a reference to how "a number" of jurisdictions address this problem. Square footage limitations are clearly valid; it seems equally clear that other "reasonable" approaches may exist, including the historic choice of the majority of local jurisdictions.

C. Ninth Circuit Reasoning Bootstraps Protections of Disabled Individuals to Otherwise Unprotected Groups

In a decision involving application of the FHAA, the Third Circuit analyzed *Moore* and *Village of Belle Terre*, concluding:

It follows that the City of Butler, no matter how valid its density concerns, could not constitutionally limit the number of related persons living together. If the absence of an occupancy limitation on the members of a family who can live together is bootstrapped into the argument that therefore there can be no occupancy limitation for unrelated persons living together, there could never be such an occupancy limitation and *Belle Terre* would be meaningless. We cannot accept such a result.

Doe v. City of Butler, 892 F.2d 315, 321 (3rd Cir. 1989).

The rationale rejected by the Third Circuit is precisely the rationale advanced here by the United States and Oxford House. They attempt to bootstrap the rights of individual disabled persons to extend protection under the Fair Housing Act to voluntary residential associations

of handicapped persons. This was not Congress' intent and indeed runs counter to the very structure of the Fair Housing Act. For the purposes of defining discrimination on the basis of familial status, Congress has itself adopted a structure which defines family in terms of minors living with their parent or other custodial guardian. See 42 U.S.C. § 3602(k).

As the Third Circuit noted in *Doe v. City of Butler*, this bootstrapping argument is an attempt to extend rights enjoyed by individuals to those of associated persons. These associational relationships are not rights protected by the First Amendment in its protection of freedom of association. *Palo Alto Tenants Union v. Morgan*, 321 F. Supp. 908, 911-12 (N.D. Cal. 1970).

The U. S. District Court in Minnesota has noted that the focus of FHAA protection is the disabled individual and not institutions and organizations. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396, 1400 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). In dismissing a preemption claim that Familystyle advanced to invalidate a 1320 foot separation requirement between community living arrangements, the court stated:

Nonetheless, the Act does not prohibit any and all state laws which have some impact on the handicapped. Even the House Report uses language which states that laws are prohibited which impact an individual's choice of residence.

Familystyle, 728 F. Supp. at 1401.

As in this case, St. Paul's limits did not prohibit individual disabled persons from occupying a particular

house, only institutions, or in this case, an unincorporated association.

The record clearly indicates the institutional nature of the Oxford House program. Individuals come, go and are expelled pursuant to the "Oxford House experience." Jt. App. at 168-172. This program is clearly an institutional approach to recovery and as such is subject to reasonable government regulation of the type discussed in *Familystyle*. The "family" protected in *Euclid*, *Belle Terre* and *Moore*, whether biological, nuclear or extended, implies a degree of stability and cultural identity simply not present in a consensual living arrangement of a constantly changing cast of adults.

Appellees argue the right of individual disabled persons to choose the location of their home. The facts are clear, however, that the individual residents did not choose the location of the House, a representative of the Oxford House parent organization did. Jt. App. at 93, 102-103. Any assertion that individual residents choose their place of residence, as opposed to enrolling in a recovery program, is unsupported by the facts. Oxford House Edmonds is an association of persons institutionalized under a national organization and strictly governed by its charter and the terms of a government grant.

D. Other Indications of Ordinance's Reasonableness

1. Economic Protection of Single-Family Zone

It is instructive to note a District Court's response in the case to an economic argument of the type put forward

by Oxford House - that it needs 8-12 residents in order to be self-sufficient. *Palo Alto Tenants Union*, 321 F. Supp. at 911. The court noted that allowing large unrelated groups into single-family neighborhoods could destroy rent structures making it impossible for a traditional family to afford rent:

Many older neighborhoods have large, once distinguished town houses which are not owner occupied. Often owners find it more profitable to rent these dwellings, not to single families, but to large groups of unrelated persons with independent sources of income. Such groups are able to pay, collectively, far more in rent than can traditional families with one, or at best two, wage earners. Thus the rent structure of a whole neighborhood may be affected by opening R-1 zones to large, unrelated living groups. As the rent and property value structure of the neighborhood is changed, single families move out, and the character of the area is altered.

Id. at 912-13.

While there is currently only one Oxford House in Edmonds, the arguments advanced are equally applicable to other groups who have been historically economically disadvantaged. The ability of any group of unrelated individuals who are within a category protected by the Fair Housing Act to ignore zoning occupancy and density limits would destroy the effectiveness and purpose of single-family zoning.

2. Balancing of Relative Harm Favors Reasonableness of Ordinance

The standard of reasonableness applicable to this case and utilized in federal law should be based upon a balancing of rights and obligations. *Elliott v. City of Athens, Ga.*, 960 F.2d 975, 981-83 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992). Appellees' standards of reasonableness fails to address why a traditional Euclidian occupancy limit is unreasonable. Their arguments also ignore a balancing of interests and the lack of real harm or detriment which Oxford House would suffer by being required to comply with the same occupancy and zoning standards that every other renter and citizen must meet. The City is simply asking Oxford House to locate in a mixed use, higher density residential zone identical to the location Oxford House chose and defended in Cherry Hill, New Jersey. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

As Oxford House's responses to interrogatories and requests for admission show, the Oxford House representative was unfamiliar with Washington state in general, and South Snohomish County in particular when he came to look for a house. Following his arrival from Washington D.C., he reviewed the rental section of one local newspaper only and selected a house in South Snohomish County. When that house proved satisfactory for his needs, it was rented without regard to its zoning. It was the first house he viewed. Oxford House's manual informs interested disabled persons wishing to establish such a recovery house that they are not obligated to

comply with local zoning occupancy limits. Jt. App. at 167.

There is no evidence that Edmonds multi-family zones are in any way unsuited to Oxford House's program. Appellees attempted to address this deficiency below by manipulating census data to show that due to low rental vacancy rates there may be few single-family type homes for rent. This is a factor of the economy, not of municipal zoning, and effects all prospective renters equally, not just persons with disabilities. Under the Fair Housing Act, persons with disabilities are guaranteed the same opportunity as those without disabilities. Unfortunately, as anyone who has tried to rent a home in the Puget Sound area knows, nothing guarantees the availability of a dream home at an affordable price.

In fact, the census data cited shows the reasonableness of the City's zoning structure. Oxford House misstated the record by confusing single-family homes with rental units. The 12,945 housing units listed in the census include rooms, apartments, and condominiums, all unsuitable for Oxford House's program. Jt. App. at 122. According to Ms. Dusenberry's affidavit, out of 8,550 single-family housing units, 967 are renter occupied and 148 are vacant. Jt. App. at 122. Therefore out of a total of about 1100 single-family houses available for rent, 258, or about one-quarter of the total, are within the multifamily zone. The City can guarantee "meaningful access" by ensuring that a significant portion of its total single-family type rental housing is in a zone available

for Oxford House's use; it can control neither the economy nor vacancy rates. *Elliott v. City of Athens*, 960 F.2d at 982.

Oxford House's approach also violates a basic principle of reasonable accommodation, that disabled persons seeking to be accommodated have a correlative duty to act reasonably in the process. As explained in *Barron v. Safeway Stores, Inc.*, 704 F. Supp. 1555 (E.D. Wa. 1988):

Both Washington and The Ninth Circuit recognize that the accommodation duty does not place the entire burden on the employer. Rather, the employee bears a "correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer."

Id. at 1568. Congress specifically directed that the enactment of the Amendments to be applied and interpreted in conjunction with other enactments designed to protect the rights of the disabled. *Jt. App.* at 143.

A court's determination of "reasonableness" should also include the City's amendment of its zoning code to permit congregate living arrangements of more than five (5) unrelated persons to be located as a matter of right in the City's multi-family and other zones. In its operations manual Oxford House claims that it has the *sole* right to determine where its houses can be located. This is the position of the national organization:

As a matter of practice, Oxford House, Inc. does not seek prior approval of zoning regulations before moving into a residential neighborhood. It considers itself no different from a biological family and its members just move into a suitable house.

United States v. Village of Palatine, Ill., 37 F.3d 1230 (7th Cir. 1994). The City asserts that so long as its zoning scheme is neutrally applied to limit the occupancy of structures by number of residents and adequately provides for group home uses in other zoning classifications, it is not in violation of the Fair Housing Act.

The City restricts the number of unrelated persons, disabled or otherwise, who can occupy a structure in a single-family zone to five or fewer. Disabled persons within a family unit or members of a family unit who are not disabled can live together without limit, as required by the U. S. Supreme Court in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). The City's five or fewer unrelated person limit provides more flexibility than the constitutionally valid limit of two or fewer persons upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). This flexibility should also be included in a court's determination of the "reasonableness" of the City's ordinance. The 1990 census indicated 2.41 persons per household in the City of Edmonds, down from the 1980 count of 2.64 persons per household, and points out the statistical basis and validity of the Edmonds' single-family zone as an occupancy limit. *Jt. App.* at 110.

The City's interest in preserving the single-family zoning resource is recognized and protected by the U. S. Supreme Court in *Euclid*, *Belle Terre*, and *Moore*. While it is true that a single exception will not damage the City's zoning scheme, abrogation of single-family zoning as it applies to the disabled opens the door to an enormous change in the traditional structure of zoning. Congressman Sensenbrenner estimated that there are 36,000,000 disabled persons at the date of the report. H. 4604 Cong.

Rec. 6.22.88. Therefore, while one group home may have only a slight impact on a neighborhood, the cumulative effect of prohibiting application of the single-family definition to disabled persons, or any protected group under the FHAA promises to destroy the basic building block of zoning.

The impact of relocating Oxford House to one of the properly zoned multi-family homes is minimal. As has been noted, the locations made available in Edmonds of mixed use residential properties in multi-family neighborhoods are virtually identical to the area defended by Oxford House in the *Cherry Hill*, New Jersey case. The only detriment which Oxford House would suffer is the requirement that, after four years of operation, they relocate to a properly zoned location. As the concurring opinion in the Seventh Circuit's decision in *Palatine* noted:

[h]ad the Oxford House not *disregarded the law in the first place*, there would be no residents illegally living in the house who could be stigmatized. In seeking affirmance of the preliminary injunction, Oxford House also emphasizes the harm its residents would suffer if displaced. Any such harm is the Oxford House's own doing; again, had Oxford House not prematurely moved the occupants into the house, no displacement would have occurred.

Palatine, 37 F.3d at 1235 (Marion, J. concurring), (emphasis added).

Therefore, in applying a balancing test such as the Eleventh Circuit did in the *Elliott* decision, the City

requests that the U. S. Supreme Court consider the traditional deference given to zoning enactments designed to protect a place of quiet seclusion for the family and balance it against the negligible impact on Oxford House residents of relocating to a properly zoned area of the City.

CONCLUSION

Appellant City of Edmonds respectfully requests that the Court reverse the Court of Appeals' decision. The Appellees, in their zeal to support the worthy cause of rehabilitation, ignore the long history of single-family zoning facts of this case and the lack of any negative impact on Oxford House by compliance with City zoning. The City concurs and its planning policies recognize that there is a real and growing need for innovative forms of treatment. Living arrangements which permit individuals to gain control of their lives and which mainstream disabled individuals should be encouraged. The crux of the dispute here is not "whether" but "where." The City asks only that, based on traditional concepts of single-family zoning as an occupancy limit, group homes locate in areas of the City which were planned, designed and intended for higher density or occupant load uses.

There is no evidence in the record that these multi-family zoned areas of Edmonds are unsuitable for Oxford House's program and indeed the description of the surrounding neighborhood from *Oxford House v. Township of Cherry Hill, N.J.*, clearly points out that Edmonds' multi-

family zones are better suited in many ways than locations which Oxford House has selected and defended in other jurisdictions. The location of the current Oxford House facility is one of happenstance. The house could easily be located in an appropriately zoned area of the City without detriment to the recovery process.

The application of a standard of reasonableness implies a balancing of interests. It seems obvious from the record that while there are little in the way of negative impacts to the Appellees, there are huge potential impacts for the City's zoning structure and indeed zoning structures throughout our country. Zoning ordinances which are designed to exclude disabled individuals entirely from the community should be struck down. Zoning ordinances which welcome the disabled in exactly the same manner as persons without disabilities by affording equal opportunities to individuals and families with disabled members and by providing adequately zoned land are not exclusionary.

This dispute also involves the issue of mainstreaming, and whether disabled individuals should have the same opportunities and obligations as other citizens. The City fails to see where or how the Fair Housing Act can be interpreted to sweepingly invalidate the historic occupancy limitations continually reviewed and approved by the U. S. Supreme Court and in place in a majority of jurisdictions throughout the country. To do so would invalidate most zoning communities' schemes.

This is not and never has been a case of discrimination. Rather, it is a case regarding whether a local jurisdiction may maintain its traditional zoning powers and exercise them to reasonably classify uses which includes

disabled persons within the community under exactly the same rights and limitations applicable to other citizens.

Respectfully submitted.

W. SCOTT SNYDER

December 1994

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904

CITY OF EDMONDS, PETITIONER

v.

OXFORD HOUSE, INC., ET AL.

AND

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

BRIEF FOR THE UNITED STATES

DENW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BEWIS
Deputy Solicitor General

CORNELIA T. L. PELAND
Assistant to the Solicitor General

JAMES EDWARD SILVER
GEORGE S. FRIEL
Attorneys

*Department of Justice
Washington, D.C. 20530
1904-1905*

QUESTION PRESENTED

Whether a municipal zoning ordinance, which limits the number of unrelated but not the number of related persons who may live together in a single-family residential zone, falls within the Fair Housing Act's exemption for "reasonable * * * restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1).

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In the Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS, PETITIONER

v.

OXFORD HOUSE, INC., ET AL.

AND

UNITED STATES OF AMERICA

*ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-30a) is reported at 18 F.3d 802. The opinion of the district court (Pet. App. 1b-13b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 14, 1994. The petition for a writ of certiorari was filed on June 13, 1994 (a Monday), and was granted on October 31, 1994. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Fair Housing Act state:

[I]t shall be unlawful * * * [t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of * * * that buyer or renter.

42 U.S.C. 3604(f)(1)(A).

For purposes of this subsection [regarding discrimination in sale or rental due to handicap], discrimination includes * * * a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford [handicapped] person[s] equal opportunity to use and enjoy a dwelling.

42 U.S.C. 3604(f)(3)(B).

Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. Nor does any provision in this subchapter regarding familial status apply with respect to housing for older persons.

42 U.S.C. 3607(b)(1).

Pertinent provisions of the Edmonds Community Development Code (ECDC) provide as follows:

CHAPTER 16.20

RS—SINGLE-FAMILY RESIDENTIAL

* * * * *

16.20.010 USES

A. Permitted Primary Uses.

1. Single-family dwelling units.

* * * * *

See J.A. 225.

21.30.010 FAMILY

Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit.

See J.A. 250.

Section 503(b) of the Uniform Housing Code (1988), which Edmonds has adopted, see ECDC § 19.10.000 (J.A. 248), states:

Floor Area. Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

See J.A. 180.

STATEMENT

1. Oxford Houses are group homes for persons recovering from alcoholism or drug addiction, and who have become drug- and alcohol-free. Pet. App. 8a. They

operate under rules providing for democratic self-governance, financial self-sufficiency, and immediate expulsion of any resident found to use alcohol or drugs while a resident. *Id.* at 9a; see 42 U.S.C. 300x-25(a)(6) (Supp. V 1993); S. Rep. No. 379, 101st Cong., 2d Sess. 118 (1990) (describing Oxford House program). Those three basic Oxford House rules are therapeutically based, and their efficacy has not been contested in this litigation.

Experience has shown that 8 to 12 residents are generally needed for Oxford Houses to function successfully, J.A. 107 (¶ 9), and the parties stipulated that Oxford House-Edmonds, the home involved in this case, could not be maintained with fewer than six residents. Pet. App. 9a, 6b; J.A. 107 (¶ 9). That minimum-size requirement for a successful group residence for recovering substance abusers is not unusual. Cf. 42 U.S.C. 300x-25(a)(1) (Supp. V 1993) (establishing federal loan fund for group homes of not less than six recovering substance abusers). A minimum of six residents ensures that any resident experiencing problems related to his or her recovery is likely to find another resident at home who is able to provide emotional support. Pet. App. 9a, 6b; J.A. 104 (¶ 9), 106 (¶ 3), 107 (¶ 9). The minimum number of residents needed in a house also depends on the number of equal shares into which the total household expenses must be divided in order to make the expenses affordable to persons working at or near the minimum wage (as most Oxford House residents do). Pet. App. 9a, 6b; J.A. 103-104 (¶¶ 5, 7, 9), 107 (¶ 9).

In 1988, Congress amended the Fair Housing Act (FHA) to prohibit discrimination in housing against persons with handicaps. Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, § 6(a), (b)(1) and (c), 102 Stat.

1620-1622.¹ The purpose of the amendment was to “end the unnecessary exclusion of persons with handicaps from the American mainstream.” H.R. Rep. No. 711, 100th Cong., 2d Sess. 18 (1988) (J.A. 134). Persons recovering from alcoholism and drug addiction are considered persons with handicaps under the amendment, so long as they are not engaged in “current, illegal use of or addiction to a controlled substance.” 42 U.S.C. 3602(h). See H.R. Rep. No. 711, *supra*, at 22 (J.A. 144-145); *United States v. Southern Management Corp.*, 955 F.2d 914, 922-923 (4th Cir. 1992).

The 1988 amendment made it unlawful to “discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of * * * that buyer or renter.” 42 U.S.C. 3604(f)(1)(A). Because handicapped persons often have special needs, Congress realized that according them the same treatment as is given to other individuals would not always lead to equal housing opportunities. H.R. Rep. No. 711, *supra*, at 25 (J.A. 150-151). Congress therefore defined “discrimination” against handicapped individuals to include “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such

¹ When originally enacted in 1968, the FHA prohibited discrimination on the basis of race, color, religion, or national origin. See Pub. L. No. 90-284, Tit. VIII, §§ 804-806, 82 Stat. 83-84. In 1974, Congress extended the Act’s coverage to prohibit housing discrimination on the basis of sex. See Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 808(b), 88 Stat. 729. The 1988 FHA amendments, in addition to extending coverage to handicapped persons, also prohibited discrimination based on familial status. Pub. L. No. 100-430, § 6(b)(1) and (2), (c) and (d), 102 Stat. 1622-1623. The amended statute defines “familial status” as discrimination against parents or other custodial persons domiciled with children under the age of 18. 42 U.S.C. 3602(k).

accommodations may be necessary to afford such person[s] equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B).² That provision thus imposes affirmative obligations to accommodate the needs of persons with disabilities and provides that failure to do so may violate the FHA.³

Congress also made clear that the prohibition against discrimination on the basis of handicap applies to municipal zoning rules and practices. H.R. Rep. No. 711, *supra*, at 24 (J.A. 147-149). Especially relevant to this case is the fact that Congress was specifically concerned about the impact of municipal zoning laws on persons whose handicaps require them to live in group homes. One "method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on * * *

² That provision does not apply to discrimination on the other bases banned by the FHA—*i.e.*, to discrimination on the basis of race, color, religion, national origin, sex, or familial status.

³ The FHA itself does not define "reasonable accommodation." Congress, however, borrowed the "reasonable accommodation" language from cases interpreting Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 794, and Congress intended those decisions to supply the governing standard. See H.R. Rep. No. 711, *supra*, at 25 & n.66 (J.A. 150), citing *Southeastern Community College v. Davis*, 442 U.S. 397 (1979). *Davis* recognized that an accommodation is not required if it either imposes "undue financial and administrative burdens," *id.* at 412, or requires a "fundamental alteration in the nature of a program," *id.* at 410. Accord *Alexander v. Choate*, 469 U.S. 287, 300 (1985). Thus, a requested accommodation in zoning practices is not required if it would either impose undue burdens on the municipality or require a fundamental change in the zoning scheme. See H.R. Rep. No. 711, *supra*, at 25 & n.66 (J.A. 150). Whether an accommodation is reasonable under this standard is a fact-specific inquiry necessarily decided on a case-by-case basis.

land-use." *Ibid.* (J.A. 148-149). In particular, Congress emphasized its concern with zoning rules that "have the effect of limiting the ability of [handicapped] individuals to live in the residence of their choice in the community," *ibid.* (J.A. 148), especially those restrictions that "have the effect of excluding * * * congregate living arrangements for persons with handicaps," *id.* at 23 (J.A. 147). One of Congress's principal reasons for adding the prohibition against discrimination on the basis of handicap to the FHA was to require municipalities to make reasonable accommodation in such "zoning decisions and practices." *Id.* at 24 (J.A. 148).

At the same time that Congress added the prohibition of handicap discrimination to the FHA, it also prohibited discrimination on the basis of familial status and created the maximum-occupancy exemption at issue in this case. The maximum-occupancy exemption provides that the FHA does not apply to "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1). The committee report on the 1988 amendments described the exemption as a provision "relating to the familial status provisions," designed to allow jurisdictions to, for example, "limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit," even when that would result in the exclusion of large families from particular units. H.R. Rep. No. 711, *supra*, at 31 (J.A. 162-163). The report further provided that such maximum-occupancy restrictions must apply "to all occupants." *Ibid.* (J.A. 163).

In 1988, Congress also enacted Section 2036 of Title II of the Anti-Drug Abuse Act of 1988 (ADAA) to encourage the development of Oxford Houses and similar group

homes. Pub. L. No. 100-690, 102 Stat. 4202, 42 U.S.C. 300x-4a (repealed), codified in current form at 42 U.S.C. 300x-25 (Supp. V 1993). That legislation requires States receiving certain federal block grants to make loans available to help establish Oxford Houses and other group homes for former substance abusers. *Ibid.* Congress used the Oxford House program as a model in establishing the ADAA loan program. 134 Cong. Rec. 33,140-33,141 (1988) (remarks of Rep. Madigan); see also S. Rep. No. 379, *supra*, at 117 ("Oxford House was the underlying model for section 2036 of the Anti-Drug Abuse Act of 1988.").

The ADAA reflects the view that "after detoxification and inpatient rehabilitation many [people] need to live in an alcohol- and drug-free environment for some time in order to avoid relapse," and that Oxford Houses "provide the kind of support necessary for [those] individuals." 134 Cong. Rec. 33,140, 33,141 (1988) (remarks of Rep. Madigan). See also H.R. Rep. No. 592, 101st Cong., 2d Sess. 21 (1990) ("The Oxford House concept represents a 'missing link' in the treatment process."). To qualify for a loan under the ADAA, a group home must have at least six residents and they must agree to abide by the three basic Oxford House rules. 42 U.S.C. 300x-25(a)(1) and (6) (Supp. V 1993). Pursuant to the ADAA, the State of Washington has made start-up loans to several Oxford Houses. J.A. 57.

2. Oxford House-Edmonds received a start-up loan under the ADAA. J.A. 57 (¶ 3), 120 (¶ 16). It operates under a charter issued by Oxford House, Inc., and it leases a house in Edmonds, Washington. Pet. App. 9a, 4b-5b; J.A. 105 (¶ 1). Approximately 10 to 12 unrelated persons recovering from alcohol or drug addiction live there as a single housekeeping unit. Pet. App. 8a-10a, 5b; J.A. 105-106 (¶¶ 1-4). The parties stipulated in the

district court that the residents of Oxford House-Edmonds are handicapped within the meaning of the FHA. Pet. App. 8a-9a, 8b; J.A. 106 (¶ 4). The residents provide each other with mutual support that is fundamental to the Oxford House approach to remaining free from addiction. *Ibid.* (¶ 3).

Oxford House-Edmonds is in a residential neighborhood, removed from "commercial zones, liquor stores, and illicit drug activity to minimize the likelihood of relapse by a resident." Pet. App. 9a; J.A. 106 (¶ 6). It has six bedrooms. J.A. 104 (¶ 7). Oxford House-Edmonds chose the house because it was sufficiently large to accommodate at least 10 residents, near public transportation, affordable, and in a neighborhood without apparent drug activity. J.A. 103-104 (¶¶ 6-7).

Under petitioner's zoning code, the neighborhood in which Oxford House-Edmonds is located is zoned single-family residential, authorizing only groups defined in the code as "families" to occupy a residential structure. Pet. App. 10a, citing Edmonds Community Development Code (ECDC) § 16.20.010; J.A. 106 (¶ 6). The zoning code defines "family" as any number of persons related by adoption, marriage, or genetics, or five or fewer unrelated persons. ECDC § 21.30.010 (J.A. 250). Because Oxford House-Edmonds needs six or more people, who are ordinarily unrelated, to operate and to qualify for a start-up loan under the ADAA, it cannot comply with the zoning code's definition of family. Pet. App. 10a; J.A. 104 (¶ 9). The parties stipulated, however, that the impact on city services and infrastructure of Oxford House-Edmonds is no different from the impact of an equally numerous group of related persons of the same ages at the same location. J.A. 110 (¶ 14).

3. After learning that an Oxford House had located in Edmonds, petitioner issued criminal citations to the

owner and to one of the residents of the house for violating the family-composition provision of the zoning code. Pet. App. 10a; J.A. 107 (¶ 10).⁴ Petitioner also sought a declaratory judgment in federal district court that its family-composition provision was exempt from the FHA. Pet. App. 11a; J.A. 40-55.⁵ Respondent Oxford House counterclaimed, seeking declaratory and injunctive relief and damages, based on petitioner's failure to make a reasonable accommodation for the Oxford House under Section 804(f)(3)(B) of the FHA, 42 U.S.C. 3604(f)(3)(B). J.A. 60, 69-79. The United States filed a separate action on the same grounds, J.A. 80-85, and the two cases were consolidated. Pet. App. 11a-12a, 4b-5b.

On cross-motions for summary judgment, the district court granted judgment for petitioner. Pet. App. 1b-13b. The court assumed that petitioner could make a reasonable accommodation by "agreeing to waive the five-person limit as to Oxford House-Edmonds." Pet. App. 9b. The court held (*id.* at 9b-12b), however, that petitioner's family-composition rule was exempt from scrutiny under the FHA as a "reasonable * * * restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. 3607(b)(1).

⁴ Petitioner later voluntarily suspended its criminal enforcement actions pending resolution of this litigation. Pet. App. 10a-11a; J.A. 107-108 (¶ 11). It refused, however, to accommodate operation of Oxford House-Edmonds on a permanent basis. Pet. App. 11a; J.A. 107-108 (¶ 11).

⁵ The City of Everett, Washington, originally was a plaintiff in the declaratory judgment action and had asserted claims against the Washington State Building Code Council and another Oxford House, J.A. 40, but the district court dismissed Everett's complaint upon stipulation of the parties. Pet. App. 3b-4b; J.A. 30. Those three entities were not parties in the court of appeals, and are not parties before this Court.

The court concluded that the "plain language of this exemption" encompassed the rule and that "[n]othing in the legislative history of the FHA require[d] a different interpretation." Pet. App. 9b-10b. The court also concluded that petitioner's five-unrelated-persons aspect of the definition of "family" was a "reasonable" occupancy limit because it advanced municipal zoning interests. *Id.* at 11b. Finally, it concluded that petitioner "cannot be faulted for exempting related persons" from its five-person limit, because "such a restriction on traditional families would probably violate the Due Process Clause of the Fourteenth Amendment." *Ibid.*

4. The court of appeals reversed. Pet. App. 1a-30a. The court noted first that the FHA should be construed "generously," *id.* at 13a, citing *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972), and that the exemptions to the coverage of such a "broad remedial statute" must be read narrowly, Pet. App. 13a, citing *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945). The court held that the ordinance was not clearly covered by the exemption applicable to "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," because although the ordinance restricts the number of *unrelated* persons who can live together, it "does not regulate the maximum number of related occupants." Pet. App. 17a.

The court of appeals held that the legislative history of the exemption resolved any doubts about whether the challenged ordinance is exempt from the anti-discrimination provisions of the FHA. It noted that Congress intended 42 U.S.C. 3607(b)(1) to exempt only restrictions that apply uniformly to "all occupants," not rules that differentiate between related and unrelated persons. Pet. App. 19a-21a, citing H.R. Rep. No. 711, *supra*, at 31 (J.A. 163). The court pointed to petitioner's

minimum-square-footage requirements for bedrooms as an example of a restriction that applies to all occupants and that is exempt from the FHA under Section 3607(b)(1). Pet. App. 20a-21a & n.4, citing ECDC § 19.10.000.

The court of appeals also concluded that its reading of the exemption was supported by the FHA's purpose "to protect the right of handicapped persons to live in the residence of their choice in the community." Pet. App. 24a, citing H.R. Rep. No. 711, *supra*, at 24 (J.A. 148). As the court explained,

[e]xempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHAA. Many cities in this country have adopted similar use restrictions. Applying the exemption would insulate these single-family residential zones from the sweep of FHAA requirements.

Pet. App. 25a (citations omitted).⁶ The court held that zoning decisions under ordinances like petitioner's must be subjected to review under the FHA, "or the policies the FHAA seeks to enforce will be frustrated." *Id.* at 26a.

Finally, the court of appeals disagreed with the Eleventh Circuit's interpretation of the exemption in *Elliott v. City of Athens*, 960 F.2d 975, cert. denied, 113 S. Ct. 376 (1992). Pet. App. 26a-29a. *Elliott* had reasoned that, because limits on the number of unrelated persons who can live together in residential areas are constitutional under *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), Congress could not have intended to apply the

⁶ The court of appeals referred to both the Fair Housing Act and the Fair Housing Amendments Act of 1988 as the "FHAA." We refer herein to the Act, as amended, as the "FHA."

FHA to such rules. The court of appeals rejected that reasoning. Pet. App. 27a. In its view,

the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance.

Id. at 28a. The FHA's requirements that a city's zoning policies reasonably accommodate handicapped persons can, the court held, exceed the constitutional floor, "requir[ing] something more than the enactment of minimally constitutional and facially neutral zoning ordinances." *Id.* at 29a. The court remanded the case to the district court for evaluation of whether petitioner had unreasonably failed to accommodate Oxford House-Edmonds under the FHA. *Id.* at 29a-30a.

5. On May 17, 1993, after briefing on appeal, the State of Washington enacted a statewide law that makes ECDC § 21.30.010 invalid as applied to a "residential structure occupied by persons with handicaps," such as Oxford House-Edmonds. The new statute, which became effective on July 25, 1993, provides:

No city may enact or maintain an ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or other unrelated individuals. As used in this section, "handicaps" are as defined in the federal fair housing amendments act of 1988 (42 U.S.C. Sec. 3602).

Wash. Rev. Ann. Code § 35.63.220 (West Supp. 1994).

SUMMARY OF ARGUMENT

The court of appeals correctly held that petitioner's family-composition rule is not a "reasonable * * * restriction[] regarding the maximum number of occupants permitted to occupy a dwelling," 42 U.S.C. 3607(b)(1), and is therefore not exempt from scrutiny under the Fair Housing Act (FHA). The language, purpose, and legislative history of the exemption, and the underlying purposes of the FHA, all demonstrate that the exemption insulates only occupancy limits that impose a maximum on the number of *all* potential occupants (rather than only some subclass of occupants) and that are therefore designed to prevent the overcrowding of dwellings.

Petitioner's family-composition rule satisfies neither of those criteria. It restricts only the number of unrelated persons, not the number of all occupants. The rule also is not designed to prevent overcrowding, because it applies regardless of the size of the dwelling at issue. Congress enacted Section 3607(b)(1) against the backdrop of a well-established distinction between maximum-occupancy restrictions, which are aimed at preventing overcrowding of dwellings, and family-composition rules (such as ECDC § 21.30.010), which are designed to foster a "family" neighborhood character. The language of the exemption shows that it authorizes only the former category of restrictions.

The legislative context in which the exemption was adopted further confirms its narrow focus. The exemption was enacted in response to the concern of some Members of Congress that the new prohibition on discrimination based on familial status would require landlords to lease even the smallest apartments to large families with many children. That concern related only

to preserving the applicability of maximum-occupancy restrictions, not to permitting family-composition rules to exclude handicapped people from residential neighborhoods.

This Court is faced in this case with only the threshold question whether petitioner's family-composition rule is entirely exempt from scrutiny under Section 3607(b)(1). The determination whether petitioner violated the FHA's reasonable-accommodation requirement by refusing to accommodate Oxford House-Edmonds in the application of ECDC § 21.30.010 requires a fact-specific inquiry that should be made in the first instance by the district court. Subjecting family-composition rules to scrutiny under the FHA would, in any event, have a practical impact much narrower than petitioner suggests. Family-composition rules would not generally be invalidated under the court of appeals decision, which simply permits the courts to determine, on a case-by-case basis, whether discrimination is present and whether an accommodation should be required for the particular group of individuals seeking it. Even such an accommodation could not be required if it would unduly burden the municipality or fundamentally alter its zoning scheme.

Construing the FHA completely to exempt single-family zoning from the statute would, on the other hand, undermine the FHA's purpose to provide handicapped persons with meaningful opportunities to live in desirable and wholesome residential environments. The reasonable-accommodation requirement is the principal means through which Congress sought to prevent discrimination against the handicapped in the provision and availability of housing.

ARGUMENT

PETITIONER'S FAMILY-COMPOSITION RULE DOES NOT FALL WITHIN THE FAIR HOUSING ACT'S EXEMPTION FOR REASONABLE RESTRICTIONS REGARDING THE MAXIMUM NUMBER OF OCCUPANTS PERMITTED TO OCCUPY A DWELLING

A. The Statutory Exemption By Its Terms Does Not Apply To Petitioner's Rule

1. *The exemption should be narrowly construed.* The starting point for determining the scope of the 42 U.S.C. 3607(b)(1) exemption is the language of that provision. See *Board of Educ. v. Mergens*, 496 U.S. 226, 237 (1990). In reading the statutory text, this Court adheres to the principle that exemptions—especially from remedial statutes—must be construed narrowly. See *John Hancock Mutual Life Ins. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 524-525 (1993); *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989); *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945); *Piedmont & Northern Ry. v. ICC*, 286 U.S. 299, 311-312 (1932). The FHA “broadly prohibits discrimination in housing throughout the Nation,” *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 93 (1979), and its “broad and inclusive” prohibition must be given “generous construction,” *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212 (1972). Conversely, any exemptions from that broad language must receive a narrow reading, reaching only those provisions that are “plainly and unmistakably within its terms and spirit.” *A.H. Phillips*, 324 U.S. at 493. Accord *Citicorp Indus. Credit, Inc. v. Brock*, 483 U.S. 27, 35 (1987). As the party seeking the benefit of the exemption, petitioner bears the burden of demonstrating

that its family-composition rule clearly fits within the statutory exemption. See *United States v. First City Nat'l Bank*, 386 U.S. 361, 366 (1967).

2. *The language of the exemption is clear.* There can be no plausible claim that petitioner's rule “plainly and unmistakably” comes within the terms and spirit of the maximum-occupancy exemption. *A.H. Phillips*, 324 U.S. at 493. Indeed, the family-composition rule clearly falls outside the plain language of the FHA exemption.

The exemption states:

[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. 3607(b)(1). Petitioner's definition of “family” for purposes of single-family zoning is as follows:

an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage * * *.

Edmonds Community Development Code (ECDC) § 21.30.010 (J.A. 250).

The text of Section 3607(b)(1) plainly does not include ECDC § 21.30.010. The statutory exemption expressly refers to restrictions regarding “the maximum number of occupants.” Petitioner's zoning ordinance, however, does not impose such a restriction, since it does not place a limit on the total number of occupants, but only on the number of occupants who are unrelated to each other. At the same time, it permits an unlimited number of related persons to live in any home in a single-family zone.

Petitioner's ordinance is thus a regulation not of the number of persons who may occupy a dwelling, but of the

biological and legal relationships among the persons allowed to live in "single-family" neighborhoods. Rules of that type are intended to regulate the character of zoned areas, not "the maximum number of occupants permitted to occupy a dwelling." As we show below, there is a clear and well-established difference between the two kinds of regulations. Congress clearly intended to apply the absolute exemption from the FHA only to maximum-occupancy restrictions, not to family-composition rules.

Petitioner has, in fact, adopted a housing code—the Uniform Housing Code (UHC)—that includes a provision illustrative of the type of regulation of "the maximum number of occupants permitted to occupy a dwelling" to which Section 3607(b)(1) applies. See ECDC § 19.10.000 (J.A. 248).⁷ The UHC chapter entitled "Space and Occupancy Standards" provides in relevant part that

⁷ The UHC, which is used primarily by jurisdictions in the western States and parts of the midwest, is one of three model housing codes in the United States. The other two are The BOCA National Property Maintenance Code (in use primarily in the northeast and the eastern part of the midwest), and the Standard Housing Code (in use primarily in the southern States). The latter two model codes prescribe minimum square footage per occupant for both living and sleeping areas. See The BOCA National Property Maintenance Code §§ PM-405.3, PM-405.5 (Building Officials & Code Administrators Int'l, Inc. 4th ed. 1993); Standard Housing Code §§ 306.1, 306.2 (Southern Building Code Congress Int'l, Inc. 1991). The American Public Health Association and the Centers for Disease Control have also adopted recommended maximum-occupancy standards, defining "Permissible Occupancy" as "the maximum number of individuals permitted to reside in a dwelling unit, or rooming unit," APHA-CDC Recommended Minimum Housing Standards § 2.51, at 12 (1986), and prescribing such a standard in terms of square feet of floor space, *id.* § 9.02, at 37.

[e]very dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two.

UHC § 503(b), at 15 (1988) (J.A. 180). That square-footage requirement is a standard, reasonable occupancy restriction.⁸ It imposes a limit, based on the number and size of a dwelling's rooms, on the number of persons who can live there. It is applicable to *all* occupants, regardless of their relationship to each other, and is plainly designed—unlike petitioner's family-composition rule—to prevent the overcrowding of dwellings. See Pet. App. 21a n.4. Petitioner has not alleged that Oxford House-Edmonds, which has six bedrooms, has failed to comply with that maximum-occupancy restriction, and respondents do not challenge its applicability to Oxford House-Edmonds. That maximum-occupancy restriction—not Edmonds' family-composition rule—is the type of

⁸ Congress exempted only those occupancy restrictions that are "reasonable," 42 U.S.C. 3607(b)(1), reflecting its awareness that some restrictions—even when tied to the floor space or number of bedrooms in a dwelling—may be unduly restrictive and thus unnecessary to prevent overcrowding. For example, a rule requiring at least 2,000 square feet of living space for each occupant would be unreasonably restrictive because people can live in much smaller spaces without creating health and safety problems. Similarly, an occupancy restriction categorically prohibiting more than one person per bedroom would be unnecessary to avoid overcrowding and would likely be viewed as unreasonably restrictive in light of prevalent occupancy patterns.

restriction that Section 3607(b)(1) exempts from the prohibitions of the FHA.

3. *It was well established when Congress enacted the exemption that family-composition rules are not maximum-occupancy restrictions.* The distinction between maximum-occupancy restrictions, which Section 3607(b)(1) exempts, and rules like ECDC § 21.30.010, governing family composition, was well established when Congress enacted the exemption. Maximum-occupancy restrictions have a purpose, structure, and operation quite different from family-composition rules. Congress acted against the backdrop of that established distinction.

The purpose of maximum-occupancy restrictions is to prevent overcrowding of dwellings in order to protect health and safety. They reflect the view that overcrowding hastens the spread of infectious disease, increases the risk of accidents, and raises psychological tensions.⁹ Maximum-occupancy restrictions tend to be

⁹ See, e.g., *Home Builders League of South Jersey, Inc. v. Township of Berlin*, 405 A.2d 381, 390 (N.J. 1979) (referring to American Public Health Association minimum recommended square footage per occupant as "affect[ing] public health, family stability and emotional well being"); *Kalimian v. Olson*, 130 Misc. 2d 861, 862 (N.Y. Sup. Ct. 1986) ("maximum occupancy provisions" requiring 80 square feet per person were "intended to prevent practices common earlier in the century, when landlords overcrowded cramped tenements and rooming house rooms with large numbers of tenants," which caused "fire and health hazards, unsatisfactory provisions as to sanitation, [and] insufficient provisions for light and air"); *Nolden v. East Cleveland City Comm'n*, 232 N.E.2d 421, 425-426 (Ohio Common Pleas Ct. 1966) (purpose of square-footage requirement was to prevent overcrowding that "overtaxes the use of plumbing," fosters spread of "infectious disease," including respiratory, digestive, and skin diseases,

framed in one of two ways, either (1) requiring a certain number of square feet of habitable floor area or bedroom floor area per occupant;¹⁰ or (2) limiting the number of persons per room or bedroom.¹¹ Because health and

elevates risks of "home accidents," and may cause problems in "social development").

¹⁰ Localities frequently adopt this type of maximum-occupancy restriction. See, e.g., ordinances cited in *United States v. Badgett*, 976 F.2d 1176, 1177 (8th Cir. 1992); *Kalimian*, 130 Misc. 2d at 862; *Nolden*, 232 N.E.2d at 423; *Sente v. Mayor & Municipal Council of City of Clifton*, 330 A.2d 321, 321-322 (N.J. 1974); *Briseno v. City of Santa Ana*, 8 Cal. Rptr. 2d 486, 487-488 (Cal. Ct. App. 1992), review denied (Aug. 27, 1992); *Zakaria v. Lincoln Property Co. No. 415, Ltd.*, 229 Cal. Rptr. 669, 672 (Cal. Ct. App. 1986).

Several States also regulate occupancy through square-footage requirements. See, e.g., Del. Code Ann. tit. 31, §§ 4106(28), 4115(k), (l), (m) and (q) (1985 & Supp. 1992) (limiting "maximum number of persons" in a dwelling based on its square footage and the size of its bedrooms); Cal. Health & Safety Code § 17922(a)(1) (West 1991) (directing state agency to adopt regulations based on Uniform Housing Code, which contains square-footage requirements); R.I. Gen. Laws § 45-24.3-11(A) and (B) (1991) (imposing minimum-square-footage requirements for each occupant); Mass. Occupancy Stds., Mass. Regs. Code tit. 105, § 410.400 (1994) (same). We express no opinion about whether any particular rule of this type, or of the type referred to in note 11, *infra*, may be unduly restrictive and therefore not a "reasonable" restriction covered by Section 3607(b)(1).

Even Congress has imposed square-footage-based overcrowding standards for dwellings acquired under a federal loan guarantee program for Native Americans. See 12 U.S.C. 1715z-13a(j)(6) (Supp. V 1993) (dwelling must meet either federally mandated minimum-square-footage requirements that vary depending on size of household or "locally adopted standards for size of dwelling units").

¹¹ For examples of person-per-bedroom restrictions at the state and local levels, see Cal. Code Regs. tit. 25, § 7612(c) (referring to

safety concerns apply to all residents, the rules addressing them do as well.

Family-composition rules, in contrast, define who may constitute a "family" for purposes of single-family zoning. Those rules aim to serve the distinct purpose of fostering the family character of a neighborhood.¹²

ordinance prescribing "maximum number of persons" based on number of bedrooms in dwelling); Cal. Health & Safety Code § 17959.5 (West 1991) (referring to "occupancy standards" that "relat[e] the number of persons in a household to the number of rooms or bedrooms"); 16 Pa. Code § 40.23 (1978) (referring to ordinance prohibiting more than two persons per bedroom); Ariz. Rev. Stat. Ann. § 33-1317(F) (Supp. 1994) ("An occupancy limitation of two persons per bedroom residing in a dwelling unit shall be presumed reasonable for this state and all political subdivisions of this state."); *Gomez v. Housing Authority of City of El Paso*, 805 F. Supp. 1363, 1372-1373 (W.D. Tex. 1992) (referring to city housing authority's occupancy standard based on number of bedrooms in dwelling), *aff'd*, 20 F.3d 1169 (5th Cir.) (Table), cert. denied, 115 S. Ct. 198 (1994); see also *State v. Baker*, 405 A.2d 368, 373 (N.J. 1979) (referring to limitations on the number of occupants in reasonable relation to available sleeping and bathroom facilities as an appropriate way to deal with overcrowding).

At the federal level at the time Congress adopted the maximum-occupancy exemption in Section 3607(b)(1), both the Farmers Home Administration (FmHA) and the Department of Housing and Urban Development (HUD) had two-person-per-bedroom rules for dwellings that were used by participants in certain federal housing programs. See 7 C.F.R. Pt. 1930, Subpt. C, Exh. B (VI)(B)(2)(a) at 250 (1988); *Debolt v. Espy*, 832 F. Supp. 209, 211-212 (S.D. Ohio 1993) (applying FmHA regulation); 24 C.F.R. 882.109(c)(2) (1988 & 1994) (guideline tied to bedrooms or "living/sleeping" rooms); see also 24 C.F.R. 882.102, 882.209(b)(2), and 887.253(a) (1994) (requiring public housing agencies that participate in HUD "Section 8" program to establish "occupancy standards" tied to the number of bedrooms in the dwelling).

¹² *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494, 521 (1977) (Burger, C.J.,

There are two typical ways in which such rules are structured, defining "family" either (1) functionally, as a single housekeeping unit that operates like a family in enumerated respects, without requiring legal or biological relatedness;¹³ or (2) as any number of related, but only a limited number of unrelated, persons, sometimes with the additional requirement that the

dissenting); *State v. Baker*, 405 A.2d at 369, 371. The purposes of petitioner's own family zoning are "[t]o reserve and regulate areas primarily for family living in single-family dwellings" and for other "uses which complement and are compatible with single-family dwelling use." ECDC § 16.20.000 (J.A. 225).

¹³ See *Smith & Lee Assocs. v. City of Taylor*, 13 F.3d 920, 925 (6th Cir. 1993) (one or more persons "cooking and living as a single, nonprofit housekeeping unit," but not including "any society, club, fraternity, sorority, association, lodge, coterie, [or] organization"); *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1333 (D.N.J. 1991) (one or more persons "living together as a single non-profit housekeeping unit whose relationship is of a permanent and domestic character, as distinguished from fraternities, sororities, societies, clubs, associations"); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1182 n.4, 1183 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 455 (D.N.J. 1992); *Borough of Glassboro v. Vallorosi*, 568 A.2d 888, 889 (N.J. 1990) ("one or more persons occupying a dwelling unit as a single non-profit housekeeping unit, who are living together as a stable and permanent living unit, being a traditional family unit or the functional equivalency [sic] thereof"); *Kirsch Holding Co. v. Borough of Manasquan*, 281 A.2d 513, 516-517 (N.J. 1971) ("A collective number of individuals living together in one house under one head, whose relationship is of a permanent and distinct domestic character, and cooking as a single housekeeping unit."); see also cases cited in *Moore*, 431 U.S. at 516-519 nn.8-14 (Stevens, J., concurring in the judgment).

unrelated persons function as a single housekeeping unit.¹⁴

Federal and state courts have expressly recognized the distinction between maximum-occupancy restrictions and family-composition rules. For example, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), contrasted the definition of "family" at issue there with East Cleveland's separate maximum-occupancy restrictions. The family definition, which the Court held unconstitutional, amounted to "regulation of the family" and "imposed [a] limit[] on the types of groups that could occupy a single dwelling unit." *Id.* at 498, 499 (plurality opinion). The Court distinguished the City's separate

¹⁴ See ECDC § 21.30.010 (J.A. 250); *Village of Belle Terre*, 416 U.S. at 2 (ordinance prohibiting cohabitation of more than two unrelated persons, but permitting occupancy by any number of persons related by blood, adoption, or marriage); *In re Miller*, 515 A.2d 904, 906-908 (Pa. 1986) (ordinance allowing any number of persons "living and cooking together as a single housekeeping unit" amended to allow not more than two unrelated persons "living and cooking together who are not related"); Brief of Township of Upper St. Clair as Amicus Curiae in Support of Petitioner at 3-4 (township code allowing two unrelated persons to live together in single-family zone, provided "the basis for the relationship cannot be therapeutic or corrective or the profit motive," and "family shall not be construed to include a personal home care, a group home, or a group living arrangement"); Brief for the City of Lubbock, Texas as Amicus Curiae in support of petitioner at ii-iii (ordinance allowing "not more than two (2) unrelated persons living and cooking together as a single housekeeping unit"); Brief Amicus Curiae of City of Mountlake Terrace Washington in Support of Petitioner at 2 (city code allowing "not more than six (6) persons not related by blood or marriage living together in a single housekeeping unit in a dwelling unit"); Brief Amicus Curiae of City of Fultondale, Alabama, in Support of Petitioner at 2 (city ordinance allowing up to five unrelated persons to live together in single-family zone).

maximum-occupancy ordinance, which addressed the "problem of overcrowding" by "limit[ing] population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor area." *Id.* at 500 n.7 (plurality opinion).¹⁵ Similarly, the New Jersey Supreme Court in *State v. Baker*, 405 A.2d 368 (1979), described an ordinance prohibiting more than four unrelated persons from living together as having the purpose to preserve "the 'family' character of the municipality's neighborhoods" or "a family style of living." *Id.* at 369, 371. The court contrasted that rule with "space related occupancy limitations," *id.* at 372 n.3, or "area-related occupancy restrictions," *id.* at 373, which "limit[] the number of occupants in reasonable relation to available sleeping and bathroom facilities or requir[e] a minimum amount of habitable floor area per occupant," *ibid.* See Pet. Br. 14 (referring to "[t]he two types of regulation * * * addressing different" local interests) (emphasis added).¹⁶

¹⁵ See *Moore*, 431 U.S. at 516, 520 n.16 (Stevens, J., concurring in the judgment) (family definitions seek to serve the "community interest in preserving the stable character of residential neighborhoods," in contrast to rules that seek to "prevent overcrowding" by "plac[ing] a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space"); *id.* at 539 n.9 (Stewart, J., joined by Rehnquist, J., dissenting) (contrasting the challenged ordinance, which was directed at "preserving the character of a residential area," with the City's separate occupancy restriction, which was aimed at "establishing minimum health and safety standards").

¹⁶ See also *Home Builders League*, 405 A.2d at 389-392 (discussing separate interests in "public health and safety" and in "character of the neighborhood and conserving property values"); *Briseno*, 8 Cal. Rptr. 2d at 490 (distinguishing definition of "family," which addresses "[t]he relationship of individuals living in a dwelling unit," from maximum-occupancy standard, "which

Maximum-occupancy restrictions are common at all three levels of government. See notes 10, 11, *supra*. On the other hand, family-composition rules, including unrelated-persons rules, have traditionally been imposed only through local zoning codes. By making Section 3607(b)(1) applicable to "local, State, or Federal" restrictions on maximum occupancy, Congress gave additional evidence of its clear intention that the Section's exemption apply to maximum-occupancy restrictions and not to family-composition rules.

In describing maximum-occupancy restrictions, courts and legislators have often used language similar to that found in Section 3607(b)(1), further reinforcing the conclusion that Congress intended the exemption to refer to such restrictions, and not to rules defining family composition. For example, the plurality in *Moore* described East Cleveland's occupancy ordinance as a restriction "tying the maximum permissible occupancy of a dwelling to the habitable floor area." 431 U.S. at 500 n.7 (emphasis added). Rhode Island's state housing code defines "[p]ermissible occupancy" as "the maximum number of persons permitted as a family or household to reside in a dwelling unit or rooming unit based on the square foot per person in habitable rooms." R.I. Gen. Laws § 45-24.3-5(29) (1991) (emphasis added). And a California municipality adopted an ordinance providing that "[n]o dwelling unit shall be inhabited in such a manner that it exceeds the maximum occupancy of the dwelling unit" and defining "maximum occupancy" in terms of minimum square footage per occupant. *Briseno*

speaks merely of how many people can live within the confines of a certain area," because the former "has no relevance to the health and safety of those in a dwelling, certainly insofar as an 'occupancy standard' is concerned").

v. City of Santa Ana, 8 Cal. Rptr. 2d 486, 488 (Cal. Ct. App. 1992), review denied (Aug. 27, 1992) (emphasis added).¹⁷ As is true in the case of petitioner's ordinance, definitions of "family" for zoning purposes do not typically contain similar language. Terms such as "maximum occupancy," "occupancy restriction" or "occupancy standard" are absent from ECDC § 21.30.010.

4. The court of appeals correctly rejected the reasoning of *Elliott v. City of Athens*. Petitioner, relying on the Eleventh Circuit's decision in *Elliott v. City of Athens*, 960 F.2d 975, cert. denied, 113 S. Ct. 376 (1992), suggests that Congress must have intended to exempt unrelated-persons rules from FHA review because this Court "approved as reasonable" such a rule by affirming its constitutionality in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Pet. Br. 11; see also *id.* at 7, 10; *Elliott*, 960 F.2d at 980. The court below correctly rejected that reasoning. Pet. App. 26a-29a. The fact that a rule is rational for constitutional purposes does not mean that it is the type of rule covered by the FHA's maximum-occupancy exemption. Congress is free to provide statutory protection to classes of individuals that is greater than the protection provided

¹⁷ See also *Haddock v. Department of Community Development*, 526 A.2d 725, 727 (N.J. Super. Ct. App. Div.) ("the number of occupants exceeded the Code maximum permitted for the dwelling units, either by reason of square foot or sleeping room minimum standards"), certification denied, 532 A.2d 228 (N.J. 1987); *Kalimian*, 130 Misc. 2d at 862 (describing rules that required a certain square footage per occupant as "maximum occupancy provisions"); *Laurenti v. Water's Edge Habitat, Inc.*, 837 F. Supp. 507, 510 n.3 (E.D.N.Y. 1993) (code provided that "[i]n dwelling units and rooming units the maximum number of occupants shall be one (1) occupant per sleeping room").

by the Constitution to all persons, and it plainly did so in the 1988 Fair Housing Amendments Act.

Petitioner and its amici also rely on the *Elliott* court's belief that municipalities cannot constitutionally impose a maximum on the number of related persons who may live together.¹⁸ They suggest that rules limiting the number of unrelated persons are thus the only rules to which the exemption could constitutionally refer. *Elliott*, however, misreads *Moore v. City of East Cleveland*, *supra*. *Moore* held unconstitutional a restrictive definition of "family" for purposes of single-family zoning that included only a few categories of related individuals, and prevented a grandmother from living with her grandsons because the grandsons were cousins rather than brothers. That case did not generally invalidate restrictions on the number of related persons who can live together, but stands for the much narrower proposition that regulation of the composition of a family of biologically related persons, by preferring nuclear families over extended families in single-family zones, violates substantive due process. 431 U.S. at 498-499 (plurality opinion); see also *id.* at 503-504 (plurality opinion). The *Moore* plurality indeed emphasized that, "[o]f course, the family is not beyond regulation," *id.* at 499, and noted with approval the separate City ordinance that "limit[ed] population density directly, tying the

¹⁸ See Pet. Br. 22, quoting *Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989); *id.* at 29; Brief of the International City/County Management Ass'n et al. as Amicus Curiae in Support of Petitioner at 15; Brief Amicus Curiae of Pacific Legal Foundation in Support of Petitioner at 9-10, 12-13; see also *Elliott*, 960 F.2d at 980-981, citing *Doe*, 892 F.2d at 321 (municipality "could not constitutionally limit the number of related persons living together"); but see *id.* at 985-986 & n.1 (Kravitch, J., dissenting) (criticizing majority opinion).

maximum permissible occupancy of a dwelling to the habitable floor area," *id.* at 500 n.7.¹⁹ Petitioner itself acknowledges (Br. 7, 14) that it applies the square-footage requirements of the UHC to related family members as well as to units of unrelated people. That maximum-occupancy restriction is precisely the type that applies to "all occupants," whether related or unrelated, and to which the FHA exemption refers.²⁰

¹⁹ Justice Stevens, whose vote was necessary to the result in *Moore*, expressly stated that "[t]o prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space." 431 U.S. at 520 n.16 (Stevens, J., concurring in the judgment).

²⁰ If Congress had intended categorically to exempt zoning rules designed to preserve the character of single-family neighborhoods, as petitioner asserts, it probably would not have drafted the language of Section 3607(b)(1) to focus on numerical limitations. Many municipalities define "family" for purposes of single-family zoning without reference to numbers of unrelated persons in a family group, but instead rely on the degree to which the group functions like a traditional biological family. See page 23 & note 13, *supra*. Definitions of family that lack any numerical element are aimed at preserving the tranquility and stability of single-family neighborhoods, but in the absence of any numerical reference they are not even arguably within the language of the exemption. See *Smith & Lee Assocs.*, 13 F.3d at 924 n.5, 929-932 (holding that Section 3607(b)(1) did not apply because "[n]othing in [the city's] zoning ordinance, including its definition of family, places restrictions on the maximum number of occupants"); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. at 1184 n.7 (holding exemption inapplicable because town's family definition "does not contain any maximum limitations as to the number of related or unrelated persons who can occupy a single-family dwelling") (emphasis added); see also *Oxford House-Evergreen*, 769 F. Supp. at 1333, 1344-1346 (subjecting to reasonable-accommodation analysis family definition that contained no numerical element). It would be odd to read Section 3607(b)(1) as

B. The Legislative History Confirms That Congress Did Not Intend The Exemption To Apply To Family-Composition Rules

To the extent that there is any ambiguity in the text of Section 3607(b)(1), the legislative history of the section confirms that Congress's purpose in enacting the exemption was to authorize reasonable restrictions on overcrowding, not rules that limit unrelated persons. The Report of the House Judiciary Committee accompanying the 1988 amendments to the FHA makes this clear. The complete description of the exemption in the section-by-section analysis is as follows:

Section 6(d) amends Section 807 to make additional exemptions relating to the familial status provisions.^[21] These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

exempting numerically based but not nonnumerically based definitions of family, especially in view of holdings that the former are more likely to be arbitrary and restrictive than the latter. See, e.g., *Borough of Glassboro*, 568 A.2d at 891-894; *City of Fayetteville v. Taylor*, 353 S.E.2d 28, 29 n.1 (Ga. 1987).

²¹ The significance of this reference to the familial-status provisions is discussed at pages 33-36, *infra*.

H.R. Rep. No. 711, 100th Cong., 2d Sess. 31 (1988) (J.A. 162-163) (emphasis added). This paragraph is the only reference in the Report to Section 3607(b)(1).²²

The House Report reinforces in at least four ways the conclusion that Section 3607(b)(1) does not cover petitioner's family-composition rule. *First*, the Report states that the exemption protects only those restrictions that are "applied to all occupants." H.R. Rep. No. 711, *supra*, at 31 (J.A. 163). It thus confirms what the statutory text itself makes clear—that the reference to "the maximum number of occupants" refers only to those rules that place an upper limit on the number of *all* occupants. The exemption does not cover rules—such as the family-composition rule at issue here—that limit the numbers of only certain types of occupants, and that do *not* limit total occupancy.

Second, in the only example the House Report gives of the type of rules the exemption was intended to cover, the Report refers to rules that "limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit." H.R. Rep. No. 711, *supra*, at 31 (J.A. 163). That illustration reflects Congress's recognition that federal, state, and local governments have an important interest in promoting health and safety by preventing overcrowding. Individual legislators repeatedly characterized the exemption as protecting rules that prevent overcrowding for health and safety reasons. For example, Senator Metzenbaum, a principal sponsor of the legislation,

²² The House Report was the only committee report issued in conjunction with the 1988 amendments, and is thus an "authoritative source" for interpreting Congress's intent in enacting the exemption. See *Garcia v. United States*, 469 U.S. 70, 76 (1984); *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

emphasized that "the bill does not prevent governments from imposing *safety and health related limitations* on the *number of persons who may occupy* a housing unit." 133 Cong. Rec. 3755 (1987) (emphasis added).²³ See also 134 Cong. Rec. 15,857 (1988) (remarks of Rep. Morella) ("This bill respects State and local ordinances regarding the *number of occupants* per unit and other *safety standards*.") (emphasis added).²⁴ Petitioner's family-composition rule is not a health or safety regulation, but instead aims at fostering the family character of the neighborhood, an interest that Congress did not deem sufficiently important to override the FHA's anti-discrimination prohibition.

Third, although Congress was presumably aware that family-composition rules (including unrelated-persons rules) are common, there appears to be no reference in the House Report—or in the floor debates or hearings—to such rules in connection with the exemption. There is thus no evidence that Congress sought to give absolute protection to municipalities' interests in fostering the

²³ Because Senator Metzenbaum was a principal sponsor of the legislation, see 133 Cong. Rec. 3723 (1987), his views provide "an authoritative guide to the statute's construction." *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-527 (1982). Accord *Rice v. Rehner*, 463 U.S. 713, 728 (1983).

²⁴ Congress's desire to protect genuine health and safety rules from challenge is consistent with exceptions that it developed specifically in response to the new handicapped protections in the FHA. See 42 U.S.C. 3604(f)(9) ("Nothing in this subsection requires that a dwelling be made available to an individual whose tenancy would constitute a direct threat to the health or safety of other individuals or whose tenancy would result in substantial physical damage to the property of others."); cf. 42 U.S.C. 3602(h)(3) (the term "handicap" "does not include current, illegal use of or addiction to a controlled substance").

family character of neighborhoods even when such regulations exclude handicapped residents. Such evidence of congressional concern applies only to the health and safety interests that overcrowding restrictions address.

Fourth, as the House Report indicates, Congress added the exemption for maximum-occupancy restrictions to the FHA in response to concerns during Congress's consideration of the new prohibition of discrimination on the basis of "familial status." That new provision makes it illegal to discriminate in housing against families containing children under the age of 18. The new prohibition prompted fears that landlords would be forced to allow large families to crowd into small housing units. See, e.g., *Fair Housing Amendments Act of 1987: Hearings on H.R. 1158 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 100th Cong., 1st Sess. 656 (1987) [hereinafter *House Hearings*] (remarks of Rep. Edwards) (questioning whether a landlord must allow a family with 10 children to live in a two-bedroom apartment). The maximum-occupancy-restrictions exemption was enacted to ensure that the prohibition on familial-status discrimination would not give large families the right to violate local rules reasonably designed to prevent safety hazards caused by overcrowding, such as the spread of disease or increased risk of fire.

During floor debates on the proposed legislation in the House and Senate, Members of Congress repeatedly emphasized that the exemption for reasonable restrictions on overcrowding was a response to the new protections for families with children. As explained by Senator Metzenbaum, Congress viewed application of maximum-occupancy restrictions as a situation "where limitations on children in housing units may be valid." 133 Cong. Rec. 3755 (1987). Representative Fish, a

principal sponsor of the legislation in the House, similarly stated:

Before leaving the subject of familial status, I want to stress that our bill makes it clear that the rights of this newly protected class would not be absolute. * * * [T]he bill would amend section 807 of the existing act to make it clear that reasonable local occupancy and zoning codes concerning the acceptable number of persons per unit would continue to apply.

134 Cong. Rec. 15,659 (1988).²⁵ Accord *id.* at 15,854 (remarks of Rep. Fish). Senator Helms, an opponent of the amendments, also recognized the validity of maximum-occupancy restrictions designed to prevent overcrowding of dwellings. The familial-status provisions themselves were unnecessary, in his view, because

there was very little actual bias against children in rental housing. Many of the apartment complexes which did not permit children were efficiency units or one-bedroom apartments which were too small to accommodate families with children and thus were often prohibited from doing so by State and local occupancy rules.

Therefore, Mr. President, health and safety concerns for the most part and not an invidious intent to discriminate against children accounted for the familial restrictions encountered by the majority of families surveyed in the study.

Id. at 19,894.

²⁵ Because Representative Fish was a chief sponsor of the amendments, his views, like those of Senator Metzenbaum, are entitled to great weight. See note 23, *supra*.

Witnesses in hearings on the legislation similarly warned of the dangers of overcrowding if Congress added a prohibition of familial-status discrimination to the FHA. See *House Hearings* 593, 596, 599-600, 604-605 (statement of Scott L. Slesinger, National Apartment Association). Mr. Slesinger emphasized that "[i]f familial status becomes a protected class, the owners must be able to set reasonable non-discriminatory occupancy limits" to prevent overcrowding, *id.* at 593, and explained that "[m]ost of the building/housing codes in the United States have limitations on the number of occupants by size of the housing units usually defined by number of bedrooms. These restrictions are placed in the codes for safety purposes." *Id.* at 605; see also *id.* at 387 (statement of James B. Morales, Staff Attorney, National Center for Youth Law); accord *id.* at 388-390, 412-413 (statement of Morales); *id.* at 514-515, 517 (American Planning Association, *Housing Discrimination Against Families With Children* 1-2, 4 (May 1984)).

Members of Congress also made the point during the hearings that they viewed the proposed exemption for reasonable maximum-occupancy restrictions as an effective response to the overcrowding concerns expressed by opponents of the familial-status protection. Representative Edwards, a principal sponsor of the legislation in the House, see note 23, *supra*, emphasized that

the bill does provide that this bill is not going to override State and local zoning laws that are reasonable, that would limit a residence to "x" number of people, maybe per square foot, or number of bedrooms.

House Hearings 413. Senator Specter expressed a similar understanding of the exemption. *Fair Housing Amendments Act of 1987: Hearings on S. 558 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 100th Cong., 1st Sess. 103-104 (1987) [hereinafter *Senate Hearings*].²⁶

C. Exempting Petitioner's Family-Composition Rule From The Fair Housing Act Would Undermine The Act's Goal Of Eliminating Zoning Barriers That Exclude Group Homes For Handicapped Individuals

This Court must interpret the FHA's exemption to avoid a result that is "plainly at variance with the policy of the legislation as a whole." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (citation omitted). Adopting petitioner's reading of the exemption would conflict with that basic principle. Indeed, petitioner's construction threatens to undermine one of the principal goals of the FHA amendments—to remove obstacles that prevent handicapped persons from living "in the residence of their choice in the

²⁶ Senator Specter had the following exchange with a witness in discussing the familial-status provisions of the proposed legislation:

[Witness:] * * * As I understand the legislation, however, Senator, nothing in the legislation does away with requirements in terms of overcrowding; that is, you know, the number of occupants per bedroom, and so forth, would be a normal and legal situation.

[Senator Specter:] Well, I think that is so, but I think we have to get a handle on how many families with children are discriminated against, how widespread a problem it is, to show that there is a real need to attack it on the national level.

Senate Hearings 103-104.

community." H.R. Rep. No. 711, *supra*, at 24 (J.A. 148). In enacting the amendments, Congress was particularly concerned about discrimination caused by facially neutral zoning rules that limit the ability of persons with handicaps to live in group homes in residential areas. *Ibid.*

Unrelated-persons rules are among the most significant of the zoning obstacles preventing persons with disabilities from establishing group homes in residences of their choice. Such group homes for handicapped persons typically require at least six persons for both therapeutic and economic reasons. See 42 U.S.C. 300x-25(a)(1) (Supp. V 1993) (establishing federal loan fund for group homes of not less than six recovering substance abusers); *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 438 n.7 (1985) (10 or 11 residents required to establish group home for the mentally retarded). Jurisdictions, however, may not generally permit that many unrelated persons to live together in a single-family zone. See H.R. Rep. No. 865, 96th Cong., 2d Sess. 52 (1980) (supplemental views of Rep. Drinan).²⁷

²⁷ During the course of this litigation, the State of Washington acknowledged the importance of protecting the rights of handicapped persons to live in group homes by enacting a new state statute prohibiting municipal laws, regulations, policies or practices that exclude group homes from neighborhoods zoned for single families. Wash. Rev. Code Ann. § 35.63.220 (West Supp. 1994). That statute prohibits not only rules that place requirements on "residential structure[s] occupied by persons with handicaps" that do not equally apply to structures occupied by other groups of unrelated persons, but also expressly prohibits rules that treat such handicapped residences differently from family residences. Because ECDC § 21.30.010 treats a group of handicapped residents differently from a related family, it is invalid under the new state statute. Petitioner's Brief does not

The facts of this case are illustrative. To qualify for a start-up loan under the Anti-Drug Abuse Act of 1988 (ADAA)—the statute under which Oxford House-Edmonds was established—a group home for recovering drug addicts and alcoholics must contain at least six residents. 42 U.S.C. 300x-25(a)(1) (Supp. V. 1993).²⁸ Moreover, the parties have stipulated that for financial reasons and to maintain the supportive environment necessary for recovery, Oxford House-Edmonds must have between 8 and 12 residents. J.A. 107 (¶ 9). Thus, petitioner's family-composition rule has a devastating exclusionary effect on group homes for recovering substance abusers in general and on Oxford Houses in particular. Petitioner's ordinance also has the effect of excluding group homes for the mentally retarded, the mentally ill, the physically handicapped, and the elderly disabled whenever those residences cannot operate within a five-person limit.

Moreover, acceptance of petitioner's argument would not just exempt five-person limits from challenge under the FHA. Some municipalities define "family" to include

address the implications of that statute for its enforcement of ECDC § 21.30.020.

²⁸ Congress also adopted the six-person minimum in a statute designed to encourage the establishment of group homes for veterans recovering from substance abuse. See Act of June 13, 1991, Pub. L. No. 102-54, § 8(b)(3)(E), 105 Stat. 271-272, codified at 38 U.S.C. 1720A note (Supp. V 1993). That statute authorizes the Secretary of Veterans Affairs to make loans to nonprofit organizations to help them lease dwellings for use as group homes for veterans who are recovering from substance abuse. See § 8, 105 Stat. 271-272. Like the ADAA, that legislation was modeled on the Oxford House program. See S. Rep. No. 379, 101st Cong., 2d Sess. 117-120 (1990); 136 Cong. Rec. 1641 (1990) (remarks of Sen. Cranston).

no more than *two* unrelated persons. See, e.g., *Village of Belle Terre*, 416 U.S. at 2.²⁹ Under the construction of the exemption advocated by petitioner, a jurisdiction could thus prevent a group residence consisting of as few as three persons from locating in a single-family residential zone. The court of appeals correctly concluded that such an interpretation of the FHA would undermine a basic goal of the legislation by impeding the "right of handicapped persons to live in the residence of their choice in the community." Pet. App. 24a-25a. A construction of the exemption so at odds with the purpose of the FHA must be rejected. *Spokane & Inland Empire R.R. v. United States*, 241 U.S. 344, 350 (1916) (an exemption may not be interpreted in a way that "would destroy the plain purpose which caused the act to be adopted"). By contrast, the reasonable restrictions on overcrowding that Section 3607(b)(1) was explicitly intended to permit are fully compatible with the protections the FHA otherwise extends to group homes for individuals with disabilities, as there plainly was no congressional purpose to immunize group homes from the health and safety protections afforded by those restrictions.

Petitioner argues, however (Br. 8, 18-21, 32-33), that its family-composition rule is consistent with the FHA because the rule subjects unrelated handicapped persons to the same limits as are applied to unrelated nonhandicapped individuals. Petitioner's argument reflects a fundamental misunderstanding of the nature of Congress's prohibition of discrimination against the

²⁹ Indeed, that is the definition used by some of the amici in this case. See Brief of Township of Upper St. Clair as Amicus Curiae in Support of Petitioner at 3-4; Brief for the City of Lubbock, Texas as Amicus Curiae in support of petitioner at ii-iii.

handicapped in housing. Section 804(f) of the FHA, 42 U.S.C. 3604(f), does not prohibit only facial or intentional discrimination against the handicapped; it also defines as an independent form of discrimination a failure to make reasonable accommodation in the application of facially neutral regulations to the handicapped. The duty to make reasonable accommodation often demands that rules be altered or waived in order to take into account the special needs of disabled persons.³⁰ Because many disabled persons require group living arrangements, accommodations in local zoning rules may be necessary in order to avoid the discriminatory impact prohibited by the FHA. As the Court acknowledged in *City of Cleburne*, handicapped persons, because of their handicaps, often are unable to live in single-family neighborhoods except in group homes.³¹ Categorically excluding group homes from those neighborhoods "deprives the

³⁰ See, e.g., *Majors v. Housing Auth. of County of DeKalb*, 652 F.2d 454, 458 (5th Cir. 1981) (reasonable accommodation under Rehabilitation Act of 1973 requires housing authority to make limited exception to "no pet" rule for persons whose handicap requires them to have a dog); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp at 1186 n.11 (exception to four-unrelated-persons rule required for handicapped group because they were entitled not merely "to be treated the same as other groups," but "to preferential treatment under § 3604(f)(3)(B)") (citing *Elliott*, 960 F.2d at 987 (Kravitch, J., dissenting)); Robert G. Schwemm, *Housing Discrimination: Law and Litigation* § 11.5(4)(c), at 11-71 (Sept. 1994) (citing as examples of reasonable accommodation "reserving a parking place for a mobility-impaired tenant closer to his unit than other tenants may be entitled to[,] and waiving a rule against nontenants using the laundry room to allow the friend of a handicapped tenant to do the tenant's laundry").

³¹ 473 U.S. at 438 n.6 (noting district court's finding that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded").

[disabled] of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community."³² Without access to a group home, many persons recovering from drug and alcohol addiction will be almost certain to relapse. Nonhandicapped persons have no comparable need for group living arrangements. Arguing that a maximum limit on unrelated persons does not violate the FHA because it treats such persons alike regardless of their handicapped or nonhandicapped status is thus similar to arguing that application of a no-animal rule to a blind person who requires a guide dog does not discriminate because the rule is generally applicable.³³

Placing all single-family zones off-limits to handicapped persons living in group homes could seriously impede the ability to find suitable locations for such homes. Oxford Houses, for example, must have at least six residents to function, and, in fact, often need 10 or more residents. See J.A. 103 (¶¶ 3, 7). As a result, relatively large dwellings are needed. Those are more

³² *City of Cleburne*, 473 U.S. at 461 (Marshall, J., concurring in the judgment in part and dissenting in part); see *ibid.* ("group homes have become the primary means by which retarded adults can enter life in the community").

³³ Because Section 3607(b)(1) exempts maximum-occupancy restrictions from all of the FHA's nondiscrimination guarantees—not just from the reasonable-accommodation requirement—petitioner's position, if accepted, might be used to argue that family-composition rules are beyond judicial scrutiny even when they are enacted with the purpose of excluding disabled persons from single-family zones. Although we believe that a zoning rule adopted with such a discriminatory intent would not be "reasonable" within the meaning of Section 3607(b)(1), this illustration highlights the extent to which petitioner's position could undermine the FHA's effectiveness.

likely to be found in single-family zones than in multi-family zones, which often consist primarily of apartments and condominiums. The evidence in this case shows, for example, that only about 3% of all single-family dwellings in Edmonds are located in areas zoned for multi-family dwellings. Compare J.A. 113 (¶ 4) with J.A. 122 (¶ 3). Closing off 97% of the municipality's single-family dwellings to Oxford House residents severely restricts and may even eliminate their housing options. In addition, Oxford Houses also must be close to public transportation and sited in residential neighborhoods, located "away from illicit drug activity and opportunities for drug and alcohol abuse, to minimize the likelihood of relapse by a resident." J.A. 103 (¶ 3). Forcing handicapped persons to limit their housing search to multi-family zones significantly interferes with their ability to find a dwelling that meets those special needs.³⁴

Petitioner's view that it may choose to accommodate handicapped individuals only in "a mixed use, higher density residential zone," Pet. Br. 26, is inconsistent with the FHA's purpose of fully integrating handicapped persons into the mainstream. The 1988 amendments sought to put an end to segregation of handicapped

³⁴ There is no basis for petitioner's contention (Br. 22-24) that, by focusing on the needs of group homes, the court of appeals impermissibly extended the protections of the FHA to institutions and associations rather than to individuals. Many handicapped persons depend on others, including persons from associations or institutions, to act as their representatives in seeking a home. There is no indication that Congress intended to deprive disabled persons of appropriate housing because they may be unable to locate and secure it on their own. See 42 U.S.C. 3604(f)(2)(C) (prohibiting discrimination against "any person associated with" a handicapped person).

persons. H.R. Rep. No. 711, *supra*, at 18 (J.A. 134).³⁵ Segregating group homes for the disabled into certain areas defeats a primary therapeutic value of those homes. Such segregation can "decreas[e] the opportunities for [handicapped residents] to associate with persons who are not members of special population groups." General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled*, App. I, at 27 (1983). Edmonds' higher density zones do not, contrary to petitioner's contention, provide "neighborhood settings indistinguishable from that chosen by Oxford House," Pet. Br. 7, precisely because they lack "the benefits of the single-family zone" that petitioner itself values highly, *id.* at 10.³⁶

³⁵ Other federal statutes illustrate Congress's intent to promote the integration of disabled individuals into residential neighborhoods. See Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 811, 104 Stat. 4324-4331 (1990), codified, as amended, at 42 U.S.C. 8013 (Supp. IV 1992) (authorizing Secretary of HUD to provide financial assistance to allow individuals with disabilities to live in group homes and other congregate living arrangements); 42 U.S.C. 6000(a)(9), 6001(8), 6021 (Supp. IV 1992) (providing financial assistance to States to promote "integration" of developmentally disabled individuals; defining "integration" to include "the residence by persons with developmental disabilities in homes which are in proximity to community resources, together with regular contact with citizens without disabilities in their communities").

³⁶ Contrary to petitioner's suggestion (Pet. Br. 8-11, 25-26, 32), we do not dispute municipalities' authority under the Fourteenth Amendment to enact and maintain so-called "Euclidian" zoning schemes establishing separate zoning districts for different uses, including single-family residency. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The FHA's reasonable-accommodation requirement applies only to handicapped persons—

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

DEVAL L. PATRICK
Assistant Attorney General

PAUL BENDER
Deputy Solicitor General

CORNELIA T.L. PILLARD
Assistant to the Solicitor General

JESSICA DUNSAY SILVER
GREGORY B. FRIEL
Attorneys

JANUARY 1995

not to unrelated persons in general or even to individuals who fall within other protected classes under the Act. The interpretation we support thus could not, contrary to petitioner's contentions (see Br. 19, 25, 29-30), be used to force municipalities to abandon their unrelated-persons rules and to permit all groups of unrelated persons to live in single-family zones. Subjecting zoning rules to scrutiny under the FHA would simply permit the courts to determine, on a case-by-case basis, whether discrimination against the handicapped was present and, at most, require waiver of an unrelated-persons rule for the particular group of individuals with disabilities seeking an accommodation. And even such an accommodation could not be required if it would unduly burden the municipality or fundamentally alter its zoning scheme. Petitioner acknowledges (Br. 29) that an exception for Oxford House-Edmonds "will not damage the City's zoning scheme." The fact-specific issue whether petitioner violated its duty of reasonable accommodation is not before the Court at this time. It will be decided in the first instance by the district court on remand.

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U.S. COURT OF APPEALS

IN THE
UNITED STATES COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.*,
Respondents.

On Petition for Certiorari to the
United States Court of Appeals
for the Ninth Circuit

JOHN W. HAMILTON, OXFORD HOUSE, INC.,
AND JOHN W. HAMILTON, AND JOHN W. HAMILTON

JOHN W. HAMILTON
(Petitioner)

1000 15th Avenue, N.W.
Seattle, WA 98107

QUESTION PRESENTED

Whether the City of Edmonds' zoning ordinance permitting any number of related persons, but no more than five unrelated persons, to reside in a house in a single family zone is exempt from the Fair Housing Act under 42 U.S.C. § 3607(b)(1), which provides that nothing in the Act "limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

LIST OF PARTIES AND RULE 29.1 STATEMENT

In addition to the parties named in the caption, the parties below included respondents Oxford House, Inc., Oxford House-Edmonds, Herb Hamilton, and the United States of America. Oxford House, Inc. has no parent company or subsidiaries. Respondent Washington State Building Code Council was dismissed by order of the district court. Pet. Br. at 6.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS,
v. *Petitioner,*

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.,*
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENTS OXFORD HOUSE, INC.,
OXFORD HOUSE-EDMONDS, AND HERB HAMILTON

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit (Pet. App. A) is reported at 18 F.3d 802 (1994). The Judgment and Order of the United States District Court for the Western District of Washington (Pet. App. B) is not reported.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on March 14, 1994. The petition for a writ of certiorari was filed on June 9, 1994 and was granted on October 31, 1994. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

STATUTES AND ORDINANCES INVOLVED

42 U.S.C. § 3607 sets forth exemptions to the Fair Housing Act, 42 U.S.C. §§ 3601 *et seq.* It provides, in

pertinent part: "(b) Numbers of occupants; * * * (1) Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

Relevant portions of the City of Edmonds Community Development Code are set forth in the Joint Appendix at 187-250.

STATEMENT

This case involves the efforts of a group of 10 to 12 individuals, who are handicapped within the meaning of the Fair Housing Amendments Act of 1988, to live together in one house in a particular area in the City of Edmonds, Washington. An Edmonds zoning ordinance stands in the way. The respondents, including the United States, contend that the application of the ordinance in this case may be challenged under the Fair Housing Act. The City claims that the ordinance is exempt from the Act under 42 U.S.C. § 3607(b)(1), set forth above.

1. The Statutory Scheme.

a. *Overview.* The Fair Housing Act ("the Act") was enacted as Title VIII of the Civil Rights Act of 1968. Pub. L. No. 90-284, Apr. 11, 1968, 82 Stat. 81, codified at 42 U.S.C. §§ 3601 *et seq.* Initially the Act outlawed discrimination in the sale or rental of housing "because of race, color, religion, or national origin." Pub. L. No. 90-284, 82 Stat. 73, 83. It was amended in 1974 to prohibit housing discrimination because of sex as well. Pub. L. No. 93-383, Aug. 22, 1974, 88 Stat. 633, 729. In the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, Sept. 13, 1988, 102 Stat. 1619 ("the FHAA"), Congress forbade discrimination based on handicap or familial status.

b. *Discrimination based on handicap.* The FHAA borrowed the definition of "handicap" from the Rehabilitation Act of 1973. See 29 U.S.C. § 706(8)(B) (Supp. V 1993). Thus "handicap" means—

"(1) a physical or mental impairment which substantially limits one or more of such person's major life activities,

"(2) a record of having such an impairment, or

"(3) being regarded as having such an impairment,

"but such term does not include current, illegal use of or addiction to a controlled substance as defined in section 802 of Title 21." 42 U.S.C. § 3602(h)(1)-(3).

The Secretary of Housing and Urban Development, who has general authority to administer the Act, *id.* § 3608, has interpreted the term "[p]hysical or mental impairment" to include "drug addiction (other than addiction caused by current, illegal use of a controlled substance) and alcoholism." 24 C.F.R. § 100.201(a)(2) (1994).¹

Subject to § 3607(b)(1) and other exemptions not relevant here, the FHAA provides that "it shall be unlawful—"

"(f)(1) To discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of [the buyer or renter] * * *.

"(2) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling, because of a handicap of [that person] * * *." 42 U.S.C. § 3604(f)(1)-(2).

In addition, the FHAA provides extra protections for handicapped persons by defining "discrimination" to include, among other things, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford

¹ Recovering alcoholics and addicts are also "handicapped" under § 504 of the Rehabilitation Act. See, e.g., *United States v. Southern Management Corp.*, 955 F.2d 914, 919 (4th Cir. 1992); *Sullivan v. City of Pittsburgh*, 811 F.2d 171, 182 (3d Cir. 1987).

such [handicapped] person equal opportunity to use and enjoy a dwelling." *Id.* § 3604(f)(3)(B); see also *id.* § 3604(f)(3)(A), (C).

c. *Enforcement.* Persons aggrieved by discriminatory housing practices may file suit in federal or State court. *Id.* § 3613. Alternatively, they may file a complaint with the Secretary of Housing and Urban Development. The Secretary may thereafter issue a charge, which will be resolved through an administrative hearing subject to federal court of appeals review unless the complainant or the respondent elects to have the charge resolved in a civil action in federal district court, in which case the Secretary "shall authorize" and the Attorney General "shall commence" the action on behalf of the aggrieved person. See *id.* §§ 3610(g), 3612.

If, however, "the Secretary determines that the matter involves the legality of any State or local zoning or other land use law or ordinance, the Secretary shall immediately refer the matter to the Attorney General for appropriate action under section 3614 * * *." *Id.* § 3610(g)(2)(C). Section 3614 empowers the Attorney General to commence a civil action in federal district court on matters referred by the Secretary and independently to bring a civil action against a person or group engaged in a pattern or practice of resistance to the rights conferred by the Act. *Id.* §§ 3614(a), (b)(1)(A).

Finally, § 3615 provides that any State or local law "that purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid."

2. Oxford House, Inc.

Respondent Oxford House, Inc., is a nonprofit corporation acting as an umbrella organization for over three hundred private, self-run, financially-independent houses for men and women recovering from alcohol or drug addiction. *Jt. App.* at 116; see also U.S. Dep't of Health and Human Services, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addic-*

tion—A Technical Assistance Manual 11 (1990) (hereinafter "HHS Technical Manual").² Since 1975 it has provided guidance and, upon satisfaction of certain standards, granted charters to groups interested in starting their own "Oxford House." *Jt. App.* at 116-19. Individuals wishing to start an Oxford House must agree to establish a single-sex home that will be democratically self-run, financially self-supporting, and completely free of drugs and alcohol. HHS Technical Manual 13-14. The home will receive an Oxford House Charter if after 90 days the members have established a house checking account, elected officers, held at least eight weekly meetings, received two recommendation letters from local recovery programs such as Alcoholics Anonymous, and submitted six weekly financial reports. *Id.* App. A at 1, 3.

The members of an Oxford House live together essentially as a family of adults. They share equally in the payment for rent, utilities, and food staples and in the upkeep and maintenance of the house. *Jt. App.* at 117. They meet weekly to discuss household affairs. HHS Technical Manual 1, 11, 23-27. Oxford Houses are not staffed by government social workers and employ no rehabilitation counselors, managers, or support staffs.

Oxford House residents must refrain completely from alcohol and drugs, both in and out of the house. HHS Technical Manual App. C at 4-5, 13.³ A single lapse brings immediate expulsion: no second chances or probationary periods are allowed. *Id.* App. C at 30. This uncompromising approach is essential to the sustained recovery of the residents. *Id.* App. C at 4-5.

Residents who remain alcohol and drug free may continue to live at an Oxford House for as long as they wish.

² The HHS Technical Manual was attached to the City's Memorandum in Support of Motion for Summary Judgment in the district court. See R. 45. Citations to "R. —" refer to the district court Record docket entries in the Joint Appendix at 23-37.

³ Appendix C to the HHS Technical Manual is the *Oxford House Manual*, parts of which are reprinted in the Joint Appendix at 167-72.

Jt. App. at 117. Some residents stay for three years or more; the average length of stay is about thirteen months. HHS Technical Manual 5; *id.* App. G at 4.

Oxford Houses make every possible effort to rent homes in mature residential neighborhoods, for it is essential to the residents' sustained recovery that they live in an environment far removed from opportunities for drug and alcohol abuse. HHS Technical Manual 16, 18-19. Residents also seek a house near public transportation so that those without cars may readily commute to and from work. *Id.* at 19. And an Oxford House must accommodate at least six residents to ensure financial self-sufficiency and to provide the mutual support necessary for recovery from alcohol and drug abuse. Jt. App. at 103, 107.⁴

The expression "recovering alcoholics and drug addicts" is misleading insofar as it suggests that Oxford House residents are not "recovered" or "former" alcoholics and addicts. Even former alcoholics and addicts who have not touched liquor or drugs for years routinely refer to themselves as "recovering" in recognition of their continued vulnerability and need for vigilance. And in fact, although the residents of Oxford Houses are recovering alcoholics and drug addicts, those houses are probably among the very few, in the hundreds of communities in which they are found, in which no one drinks or takes drugs.

⁴ The Washington state official responsible for facilitating the establishment of self-run, self-supported houses for recovering alcoholics and addicts in Washington communities said this about household size:

"Stability is a major reason for the success of the Oxford House program and an important reason Oxford Houses remain stable is due largely to the number of individuals required to make them work, both financially and programmatically. Fewer individuals would have a definite negative impact on the ability of a house to maintain a core group throughout [transition periods] and would surely jeopardize their success and existence." Jt. App. at 58.

3. The Anti-Drug Abuse Act.

Recognizing the success of the Oxford House approach, Congress encouraged the establishment of self-run, self-supported recovery houses in the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, tit. II, § 2036, 102 Stat. 4181, 4202 (codified as amended at 42 U.S.C. § 300x-25 (Supp. V 1993)) (reproduced in Jt. App. at 185-86). In Title II of that Act, Congress enacted a variety of treatment and prevention measures, among them the promotion of group recovery homes modeled after Oxford House, to "continue the Federal Government's partnership with the States in the development, maintenance, and improvement of community-based alcohol and drug abuse programs." 42 U.S.C. § 201 note (Supp. V 1993). Congressman Edward Madigan, one of the sponsors of the group home provision, stated: "Self-run and self-supported addiction recovery houses—such as Oxford House—hold out great promise as a cost-effective way to help addicted individuals who want to recover." 134 Cong. Rec. E3732 (daily ed. Nov. 10, 1988).

Under the Act, States receiving federal block grant funds for substance abuse and mental health services must establish a revolving fund of at least \$100,000 for start-up loans for group recovery houses. 42 U.S.C. § 300x-25(a). To qualify for a loan from the fund, a house must have at least six residents, all of whom must agree (1) to prohibit the use of alcohol or illegal drugs; (2) immediately to expel any resident who uses drugs or alcohol; (3) to share all costs of the housing; and (4) to establish the rules of the house through majority vote. *Id.* § 300x-25(a)(6)(A)-(D). Loans are typically used for advance rental payments or security deposits and must be repaid within two years. *Id.* § 300x-25(a)(4).

The State of Washington provides start-up loans under this legislation. Jt. App. at 57. Its Department of Social and Health Services ("DSHS") contracted with Oxford House, Inc., to assist in the administration of the loan fund and to provide technical assistance in establishing Oxford Houses in the State. *Id.* at 119. As of 1992, the

DSHS had made start-up loans to seventeen Oxford Houses. *Id.* at 57.

4. The Establishment of Oxford House-Edmonds.

Respondent Oxford House-Edmonds began in July of 1990 with a start-up loan from the DSHS and the assistance of Mark Spence, a representative of Oxford House, Inc., who was under contract with the DSHS. *Id.* at 57-59, 102-03. After looking at a number of houses in Edmonds, Mr. Spence ended up renting the one he had seen first because it has six bedrooms that can accommodate at least ten residents, is near public transportation, and is located in a residential neighborhood with a low crime rate and no evidence of drug trafficking. *Id.* at 94, 103-04.

For purposes of this litigation the parties have stipulated to the following facts about Oxford House-Edmonds and its residents:

1. The residents are handicapped persons within the meaning of the Act and live together as a single housekeeping unit. *Id.* at 105-06.
2. They do not drink or take drugs. *Id.*
3. Apart from some early concerns related to zoning, the residents have fit smoothly into the neighborhood, generating no complaints about their behavior. *Id.* at 108.
4. Oxford House-Edmonds must maintain at least six residents to preserve financial self-sufficiency and to achieve a supportive group environment for recovery; with any fewer residents the House could not viably operate at its current location. *Id.* at 107.
5. The effect of the House on city services and infrastructure is qualitatively and quantitatively the same as the effect of an equally-sized family of related persons of the same age at the same location. *Id.* at 110.

5. The City's Response.

On July 20, 1990, the City asserted that the residents of Oxford House-Edmonds were in violation of the Edmonds Community Development Code ("ECDC").⁵ The ECDC permits only a "family" to live in areas zoned for single-family residences and defines a "family" to be an unlimited number of related persons or five or fewer unrelated persons. *Jt. App.* at 106-07, 250. That ordinance has the effect of excluding Oxford House-Edmonds from 97 percent of the rental housing available in the City. (See note 27, *infra.*) The residents requested that the City grant them a "reasonable accommodation" under § 3604(f)(3)(B) of the FHAA by waiving the unrelated persons rule in their case, but the City refused.⁶

Oxford House, Inc., thereupon filed a complaint with the Secretary of Housing and Urban Development. *Jt. App.* at 64. The City sought a declaratory judgment in federal district court that its ordinance is exempt from the Act. *Id.* at 40, 107. Oxford House, Inc., counterclaimed, asserting that the City had violated the Act by refusing to make a reasonable accommodation under § 3604(f)(3)(B). *Id.* at 60, 76. The United States filed a separate action against the City alleging the same violation. The two cases were consolidated.

6. The Decisions Below.

On stipulated facts and cross-motions for summary judgment, the district court held that the City's ordinance is exempt from the Act under § 3607(b)(1). *Pet. App. B* at 7-10. The court noted that the City could have made a reasonable accommodation by "agreeing to waive the five-person limit as to Oxford House-Edmonds" (*id.*

⁵ Letter of July 20, 1990 from Edmonds Assistant City Planner to Mark Spence (R. 51, Memorandum by the United States in Support of Motion for Partial Summary Judgment, Appendix, Tab 2).

⁶ Letter of July 24, 1990 from Edmonds City Attorney to Mark Spence (R. 51, Tab 3).

at 9), but ruled that the Act did not require the City to do so because its ordinance was exempt. *Id.* at 11-12.

The court of appeals reversed. It held that § 3607 (b)(1) does not exempt single family use restrictions such as the City's zoning ordinance but instead exempts only occupancy restrictions that apply uniformly to all residents, related and unrelated. Pet. App. A at 2554, 2557-58. The court rejected the City's construction because, if accepted, it would "undermine the purposes" of the Act by insulating all "single-family residential zones from the sweep of FHAA requirements." *Id.* at 2562. Accordingly, the court of appeals remanded for consideration of respondents' claim that the City violated the Act by refusing to make a reasonable accommodation in its ordinance so as to permit the residents of Oxford House-Edmonds to remain in their current location. *Id.* at 2566-67.

SUMMARY OF ARGUMENT

I.

Section 3607(b)(1) exempts from the Fair Housing Act "any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The City construes that exemption broadly to exempt single family zoning ordinances "in place in the majority of communities throughout the country." Pet. Br. at 6. The Ninth Circuit construed the exemption narrowly to reach only the kind of health and safety related occupancy restrictions that are commonly found in housing codes. In our view the words of the exemption, read by themselves, do not tell us which construction is correct. But when they are read in the context of the overall statutory scheme, and in light of other federal statutes that foster group homes such as Oxford Houses and that declare a "national interest" in offering certain handicapped persons "the opportunity, to the maximum extent feasible * * * to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens," the meaning of those

words emerges with unmistakable clarity. As we shall show, they cannot possibly be read to permit communities throughout the Nation to ban group homes for handicapped persons.

A. The Fair Housing Act was drafted in "broad and inclusive" language which is to be given a "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Traficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212, 211 (1972) (citation omitted). The FHAA not only brought handicapped persons under the sweeping protections already existing in the Act but also conferred on them special protections not afforded any other covered class. It did so by defining "discrimination" to include, among other things, "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). That provision has been widely construed to require municipalities to make an exception to zoning ordinances when necessary to accommodate the housing needs of handicapped persons. The breadth of these antidiscrimination provisions favors the Ninth Circuit's narrow construction of § 3607(b)(1), which fosters the broad remedial purposes of the FHAA and follows the rule that exemptions to remedial statutes must "be narrowly construed." *A.H. Phillips Co. v. Walling*, 324 U.S. 490, 493 (1945).

B. Congress intended in the FHAA to reach zoning ordinances and knew that many of the handicapped persons on whom it was conferring fair housing rights need to live in group homes in residential neighborhoods. The original Act provided that inconsistent local laws were invalid, 42 U.S.C. § 3615, and Congress was well aware when it reenacted that provision without change in 1988 that many discriminatory municipal zoning ordinances had been held invalid under that provision. Moreover, the FHAA itself confers jurisdiction on the Attorney General over any matter involving "the legality of any State

or local zoning or other land use law or ordinance." 42 U.S.C. § 3610(g)(2)(C). Thus in enacting the FHAA Congress clearly meant for local zoning ordinances to continue to be covered by the Act.

By 1988 Congress had also recognized and endorsed the importance to handicapped persons of living in normal residential communities. Medical and social service professionals had come to understand that the institutionalization of disabled individuals exacerbates their difficulties, whereas integration into normal communities maximizes their ability to achieve their human potential. Congress encouraged the "deinstitutionalization" movement in 1984 when it enacted the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662, to provide financial assistance to States to support persons with developmental disabilities "to achieve their maximum potential through increased independence, productivity and integration into the community." 42 U.S.C. § 6021. And in amending that Act in 1987 Congress found that "[i]t is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens." 42 U.S.C. § 6000(a)(9). Moreover, two months after enacting the FHAA, the same Congress enacted the Anti-Drug Abuse Act, which expressly supports group homes for recovering alcoholics and addicts such as Oxford Houses.

This context, when added to the overall policy of the FHAA and its express coverage of zoning ordinances generally, dooms the City's construction of § 3607(b)(1) to exempt ordinances that exist in "thousands [of cities] throughout our Nation." Pet. Br. at 8. Congress could not conceivably have intended that provision to permit all those communities to declare themselves off-limits to handicapped persons—whether mentally retarded, elderly, physically disabled, or recovering alcoholics and addicts—who need to live in group homes. The Ninth Circuit's

narrow construction, by contrast, preserves legitimate health and safety occupancy restrictions without excluding many handicapped persons from vast areas of the Nation's housing.

C. The Ninth Circuit's construction is also supported by the language of § 3607(b)(1), which is written in the terms of an "occupancy" restriction rather than a "use" restriction. The two differ. "Use" restrictions are embodied in zoning codes enacted "to divide the land into different districts, and to permit only certain uses within each zoning district," whereas "occupancy" restrictions are generally set forth in housing codes and among other things regulate "minimum space per occupant * * * to prevent overcrowding and the blighting of residential dwellings." 1 Rohan, *Zoning and Land Use Controls* §§ 1.102[1], 1.02[6][c] (1992) (footnote omitted). Use restrictions have often been used in a discriminatory manner to exclude disfavored classes of persons, whereas occupancy restrictions, because rooted in health and safety concerns, have been applied uniformly without regard to the different characteristics of the persons subject to their terms. The use of the words "occupants" and "occupy" in § 3607(b)(1) shows that Congress meant to exempt only true occupancy restrictions. The Secretary of Housing and Urban Development ("HUD"), charged with administering much of the Act, also believes that the kinds of restrictions Congress meant to exempt are those that are "based on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." 24 C.F.R. ch. I, subch. A, App. I.

In short, when it exempted "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," Congress intended to adopt this common interpretation of maximum occupancy restrictions as establishing a maximum number of occupants based on the amount of space in the dwelling—regardless of the character of

that occupant—to prevent health and safety problems caused by overcrowding.

The City urges that its ordinance is exempt because, in defining families, it does limit the maximum number of unrelated people—albeit not related people—who may live in a house. But the statutory language does not suggest Congress' willingness to distinguish among categories of prospective occupants. Congress exempted only restrictions on "*the* maximum number of occupants," not the maximum number of *some* categories of occupants but not others, and not "*a*" maximum applicable to some but not all occupants. Hence the City's approach gives a dubious meaning to the words of § 3607(b)(1), construes an exemption to a remedial statute broadly rather than narrowly, and produces a result contrary to the Act's overall purposes.

D. Section 3607(b)(1)'s requirement that occupancy restrictions be "reasonable" also supports the Ninth Circuit's construction. If, as that court held, Congress meant only to exempt true "occupancy" restrictions, the reasonableness of any particular restriction may be readily determined by evaluating whether it serves the health and safety concerns commonly addressed in uniform housing codes. It is not so simple if Congress meant for § 3607(b)(1) to exempt zoning ordinances like the City's. The City and its supporting *amici curiae* argue that the City's ordinance is reasonable because it is constitutional and supposedly does not discriminate against handicapped persons. But the adoption of a constitutional reasonableness standard would mean that the FHAA gave handicapped persons needing to live in group homes no protection the Constitution did not already provide; that Congress intended the Act to reach only unconstitutional ordinances; and that, contrary to Congress' intent, municipalities could exclude group homes for handicapped persons altogether. And the reasonableness of an ordinance under § 3607(b)(1) cannot turn on whether it is discriminatory, for a nondiscriminatory ordinance by definition does not violate the Act and has no need for an exemption. Finally,

if "reasonable" does mean "nondiscriminatory," courts considering whether a restriction is exempt will have to resolve what are essentially merits issues regarding the discriminatory impact of the ordinance at issue. Thus the difficulty of discerning an appropriate test for the reasonableness of a zoning ordinance under § 3607(b)(1)—one that does not equate reasonableness with "constitutional" or "discriminatory" and that would not collapse the exemption issue into the merits—further supports the Ninth Circuit's construction.

E. The Ninth Circuit's interpretation if accepted will not "destroy the effectiveness and purpose of single family zoning." Pet. Br. at 25. If single family zoning ordinances are not exempt, it means only that they may be challenged under the Act's prohibitions against discrimination found in § 3604(f)(1)-(3). In this case the respondents claim that the City has violated § 3604(f)(3)(B) by refusing to make a reasonable accommodation in its ordinance for Oxford House-Edmonds. If the decision below is affirmed and respondents prove that claim on remand, the City will still remain free to enforce its ordinance against other group homes such as college fraternities and boarding houses.

F. The City and its supporting *amici* incorrectly contend that, because this Court in constitutional rulings has upheld the broad zoning powers of municipalities, Congress must have intended to exempt single family ordinances from the Fair Housing Act. Pet. Br. at 9-11. This argument ascribes to Congress the senseless goal of subjecting only unconstitutional ordinances to the Act. It also misperceives the issue in this case, which as the Ninth Circuit correctly ruled "is not whether Edmonds' ordinance could withstand a constitutional challenge * * * [but] whether Congress intended to apply the substantive standards of the FHAA to the ordinance." Pet. App. A at 2565. Congress may by statute confer rights additional to those in the Constitution, and that is precisely what it did in the FHAA.

G. Because the Ninth Circuit's construction of § 3607(b)(1) is supported by the words of the statute and gives the exemption a meaning that is most in harmony with the overall structure and purpose of the FHAA and related federal law, it should be adopted even assuming that the City's construction is plausible based solely on the plain language of § 3607(b)(1). The Fair Housing Act is to be given a "generous construction," *Trafficante*, 409 U.S. at 209; exemptions to remedial statutes should be read narrowly; and it is "well settled doctrine * * * to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 355 U.S. 1, 31 (1948).

II.

The legislative history confirms our view. The sole Congressional report on the FHAA shows that Congress expressly intended that "the prohibition against discrimination against those with handicaps [would] apply to zoning decisions and practices"—and, in particular, to those that bar handicapped persons from group homes by imposing restrictions "on congregate living arrangements among non-related persons with disabilities." H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2185; Jt. App. at 147-48. Indeed, prior to reporting out the bill that became the FHAA, the House Judiciary Committee rejected an amendment to exempt zoning restrictions enacted without discriminatory intent, and the amendment's supporters voted against the FHAA because of its "impact on state and local government zoning authority." *Id.* at 89; 1988 U.S.C.C.A.N. at 2224.

The legislative history also confirms that Congress' use of the words "occupy" and "the maximum number of occupants" in § 3607(b)(1) was intended to exempt not "use" restrictions but true "occupancy" restrictions applicable to all occupants and enacted to prevent health and

safety problems caused by overcrowding. In describing the exemption the House Report noted that "[a] number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit," and stated that such limitations "would be allowed to continue, as long as they were applied to all occupants." *Id.* at 31; Jt. App. at 162-63 (emphasis added). In short, the legislative history leads down a single path to the same conclusion reached earlier on consideration of the statutory language—that the Ninth Circuit's construction of § 3607(b)(1) is correct.

III.

The City's ordinance is not exempt under § 3607(b)(1). By its own terms it is a "use" restriction, not an "occupancy" restriction, Jt. App. at 225-26, and the City itself observes that the word "family," over which Oxford House-Edmonds stumbles, is defined in the ordinance "for the purposes of the 'use' provisions of the code." Pet. Br. at 3 (emphasis added). Moreover, the City elsewhere has adopted a true occupancy restriction prescribing specific square footage requirements "[w]here more than two persons occupy a room used for sleeping purposes," ECDC § 19.10.000 (Jt. App. at 248, adopting the 1991 Uniform Housing Code)—a restriction that *would* be exempt under § 3607(b)(1).

IV.

Like the City and its supporting *amici*, the Eleventh Circuit in *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992), reasoned incorrectly that because this Court has upheld the constitutionality of single family zoning ordinances like the one at issue there (and here), they are the kind of restrictions Congress must have meant to exempt from the Act. *Id.* at 979-81. The court then determined that the ordinance was "reasonable" under § 3607(b)(1) by essentially engaging in a constitutional analysis, balancing the municipality's interests against the interests of handicapped persons and concluding that, be-

cause some areas in the city were not closed off, the city had "preserved meaningful access for group homes for handicapped persons in its residential areas." *Id.* at 983. That analysis mistakenly equated "reasonable" under § 3607(b)(1) with "constitutional" and "nondiscriminatory," and it confused the issue of compliance with the issue of exemption. Moreover, the court erred in ruling that § 3607(b)(1) "is an attempt on the part of Congress to advance the interests of the handicapped without interfering seriously with reasonable local zoning." *Id.* Congress *did* intend to interfere with local zoning that excludes persons with disabilities from residential areas, particularly those who need to live in group homes. In short, *City of Athens* construed the Act to defeat rather than serve its purposes by allowing cities to segregate group homes or exclude them altogether, and should not be adopted.

ARGUMENT

I. THE PLAIN LANGUAGE OF § 3607(b)(1) DOES NOT EXEMPT THE CITY'S ORDINANCE.

The City would construe § 3607(b)(1) broadly to exempt its single family zoning ordinance from the Act—and, accordingly, similar ordinances "in place in the majority of communities throughout the country." Pet. Br. at 6. That construction would permit all those communities to ban group homes for handicapped persons. The Ninth Circuit construed § 3607(b)(1) narrowly to exempt only health and safety related restrictions that apply uniformly to all occupants of a dwelling, such as square footage occupancy restrictions found in housing codes. That construction preserves legitimate health and safety occupancy restrictions without putting vast areas of the Nation's housing off limits to many handicapped persons.

In choosing between the two constructions, "[t]he starting point * * * is the language itself." *Southeastern Community College v. Davis*, 442 U.S. 397, 405 (1979) (citations and internal quotation marks omitted). Section

3607(b)(1) exempts "restrictions regarding the maximum number of occupants permitted to occupy a dwelling." In our view those words, standing by themselves, do not tell us whether the City's or the Ninth Circuit's construction is correct. They must be read, however, not by themselves but "with[] reference to the statutory context." *Shell Oil Co. v. Iowa Dep't of Revenue*, 488 U.S. 19, 25 (1988) (footnote omitted). "Over and over [this Court has] stressed that '[i]n expounding a statute, [it] must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 113 S. Ct. 2173, 2182 (1993) (citation omitted). As we shall show, when § 3607(b)(1) is read in the overall context of the FHAA, and Congress' contemporaneous efforts to foster group homes for Oxford Houses and the chance for other handicapped persons "to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens," its meaning is clear.

A. The Broad Language And Overall Policy Of The FHAA Provide Sweeping Protections For Handicapped Persons.

The FHAA is a remedial statute prohibiting housing discrimination based on handicap or familial status. It expands an act originally drafted in "broad and inclusive" language which is to be given a "generous construction" in order to carry out a "policy that Congress considered to be of the highest priority." *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 209, 212, 211 (1972) (citation omitted); see also *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982). The added protections for handicapped individuals are also written broadly. The FHAA forbids discrimination on the basis of a handicap "in the sale or rental" of a dwelling, or "in the terms, conditions, or privileges of sale or rental of a dwelling, or in the provision of services or facilities in connection with such dwelling." 42 U.S.C. § 3604(f)(1)-(2). It is also

unlawful "to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap." *Id.* § 3604(f)(1). Those prohibitions echo the ones applicable to other persons protected under the Fair Housing Act. See *id.* § 3604(a)-(b). But for handicapped persons Congress went further and defined "discrimination" to include—

"(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises * * * necessary to afford such person full enjoyment of the premises * * *;

"(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling; or

"(C) * * * a failure to design and construct [covered multifamily] dwellings in such a manner that [they are readily accessible to handicapped persons] * * *." 42 U.S.C. § 3604(f)(3)(A)-(C).

These provisions confer on handicapped persons additional protections not afforded to any other class covered by the Act. The "reasonable accommodation" provision in subsection (B) has been widely construed to require municipalities to make exceptions to zoning ordinances when necessary to accommodate the housing needs of handicapped persons.⁷

⁷ *E.g.*, *Bangerter v. Orem City Corp.*, No. 92-4150, 1995 U.S. App. LEXIS, at 471 *28-29 (10th Cir., Jan. 11, 1995); *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683, 699-700 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1581 (E.D. Mo. 1994); *United States v. City of Philadelphia*, 838 F. Supp. 223, 228 (E.D. Pa. 1993), *aff'd mem.*, 30 F.3d 1483 (3d Cir. 1994); *North Shore-Chicago Rehabilitation, Inc. v. Village of Skokie*, 827 F. Supp. 497, 499-500 (N.D. Ill. 1993); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179, 1186 (E.D.N.Y. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 462 n.25 (D.N.J. 1992).

The breadth of the Act's antidiscrimination provisions in general, and the special status conferred on handicapped persons by the provisions just mentioned, support the Ninth Circuit's construction of § 3607(b)(1). That construction gives maximum effect to the broad remedial purposes of the FHAA and is faithful to the rule that exemptions to remedial statutes must "be narrowly construed." *A.H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945).⁸

B. Congress Intended The FHAA To Apply To Zoning Ordinances And Knew That Many Handicapped Persons Must Live In Group Homes In Residential Neighborhoods.

The Congress that enacted the FHAA knew that zoning ordinances had been successfully challenged under the original Act. Section 3615 ("Effect on State laws") declared inconsistent state and local laws invalid,⁹ and by 1988 many decisions, some relying expressly on that provision, had enjoined enforcement of discriminatory zoning ordinances.¹⁰ Congress is presumed to have been aware

⁸ "To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people." *A.H. Phillips*, 324 U.S. at 493.

⁹ That provision states among other things that "any law of a State, a political subdivision, or other such jurisdiction that purports to require or permit any action that would be a discriminatory housing practice under this [Act] shall to that extent be invalid." 42 U.S.C. § 3615.

¹⁰ *E.g.*, *Town of Huntington v. Huntington Branch, NAACP*, 488 U.S. 15 (1988) (zoning ordinance restricting location of multifamily housing projects had disparate impact on minorities); *United States v. City of Parma*, 661 F.2d 562, 572 (6th Cir. 1981) (citing § 3615 in applying the Act to municipalities, and upholding invalidation of discriminatory ordinance); *Metropolitan Housing Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1294 & n.12 (7th Cir. 1977) (holding that "the Village's zoning powers must give way to the Fair Housing Act" and citing § 3615); *United States v. City of Black Jack*, 508 F.2d 1179, 1188 (8th Cir. 1974) (enforcement of discriminatory ordinance enjoined under authority

of "this well-established judicial interpretation" when it extended the Act's protections to handicapped persons, and to have endorsed the Act's coverage of local zoning ordinances when it reenacted § 3615 without change. See, e.g., *Herman & MacLean v. Huddleston*, 459 U.S. 375, 385-86 (1983); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353, 381 (1982); *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978).

The 1988 Amendments themselves further demonstrate Congress' intent to subject zoning ordinances to the Act. Section 3610(g)(2)(C) directs the Secretary of HUD to refer to the Attorney General any matter that "involves the legality of any State or local zoning or other land use law or ordinance." Hence no one can doubt that, in enacting the FHAA, Congress meant for local zoning ordinances to continue to be covered by the Act.

Congress also was aware that many of the handicapped persons to whom it was extending the Act's protections cannot live alone but require group living arrangements in residential areas. Beginning in the 1960's, medical and social service professionals gained a better understanding of the capabilities and needs of individuals with disabilities. They came to understand that institutional life impairs these individual's motor, learning, communication, and general social skills,¹¹ whereas life in the community exposes them to "the patterns of life and conditions of everyday living which are as close as possible to the

of § 3615); *Kennedy Park Homes Ass'n v. City of Lackawanna*, 318 F. Supp. 669 (W.D.N.Y.), *aff'd*, 436 F.2d 108 (2d Cir. 1970).

¹¹ Faber, *Mental Retardation, Its Social Context and Social Consequences* (1968); Woloshin et al., *The Institutionalization of Mentally Retarded Men Through the Use of a Halfway House*, J. Ment. Retard. 21 (June 1966); Tizard, *Community Services for the Mentally Retarded* (1964); Dentler & Mackler, *The Socialization of Institutional Retarded Children*, 2(4) J. Health Human Behavior 243 (1961); Phillips & Bathazar, *Some Correlates of Language Deterioration in Severely and Profoundly Retarded Long-Term Institutionalized Residents*, 83 Am. J. Mental Deficiency 402-408 (1979).

regular circumstances and ways of life of society"¹² and offers opportunities for normal social integration and interaction that maximize their ability to achieve their human potential and become contributing members of society.¹³ In 1983 a survey by the U.S. General Accounting Office found that the single most important siting factor for group homes for mentally disabled persons was a safe neighborhood, followed by neighborhood stability and a high percentage of single family residences within the neighborhood.¹⁴ And two years later, in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), this Court noted the district court's findings that:

"Group homes currently are the principal community living alternatives for persons who are mentally retarded. The availability of such a home in communities is an essential ingredient of normal living patterns for persons who are mentally retarded, and each factor that makes such group homes harder to establish operates to exclude persons who are mentally retarded from the community." *Id.* at 438 n.6.

Justice Marshall, concurring in part and dissenting in part, wrote:

¹² Steinman, *The Impact of Zoning on Group Homes for the Mentally Disabled: A National Survey*, at 1, ABA Section of Urban, State, & Local Gov't Law (1986) (citing Nirje, "The Normalization Principle," in *Changing Patterns in Residential Services for the Mentally Retarded*, at 231 (Kugel & Shearer rev. ed. 1976)); Butler & Bjaanes, "Activities and the Use of Time By Retarded Persons in Community Care Facilities," in *Observing Behavior: Theory and Application in Mental Retardation*, at 379-80 (Sackett ed. 1978).

¹³ Jaffe & Smith, American Planning Ass'n, Planning Advisory Serv. Rep. No. 397, *Siting Group Homes for Developmentally Disabled Persons*, at 4 (Hecimovich ed. 1986); Cournois, M.D., *The Impact of Environmental Factors on Outcome in Residential Programs*, 38(8) Hosp. & Community Psychiatry 848 (Aug. 1987).

¹⁴ U.S. General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled*, App. 1, at 9 (1983).

"For retarded adults, this right [to establish a home] means living together in group homes, for as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. * * * Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment—the ability to form bonds and take part in the life of a community." *Id.* at 461.

Congress recognized the importance of the deinstitutionalization movement in 1984 by enacting the Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 98-527, 98 Stat. 2662. That Act provides financial assistance to States to support persons with developmental disabilities "to achieve their maximum potential through increased independence, productivity, and integration into the community." 42 U.S.C. § 6021. It states this finding:

"The treatment, services, and habilitation for a person with developmental disabilities should be designed to maximize the developmental potential of the person and should be provided in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6009(2) (1988).

In 1987 Congress further amended that Act and added this finding:

"[I]t is in the national interest to offer persons with developmental disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens." Pub. L. No. 100-146, tit. I, § 101(8), 101 Stat. 840, 841 (codified as amended at 42 U.S.C. § 6000(a)(9) (Supp. V 1993)).

Thus by 1988, when Congress extended fair housing rights to handicapped persons, it knew of the great importance to many of those persons of group homes in residential communities.

This background counsels against construing § 3607(b)(1) to exempt zoning ordinances that exist in "thousands [of cities] throughout our nation." Pet. Br. at 8. That construction would permit all those communities to declare themselves off limits to persons whose handicaps require group living—including individuals who are mentally retarded, elderly, physically disabled, or recovering alcoholics and addicts. It would exempt even ordinances enacted intentionally to discriminate against handicapped individuals.¹⁵ And its construction would frustrate the national policy, stated in the Developmental Disabilities Assistance and Bill of Rights Act, of enabling developmentally disabled persons—who are handicapped within the meaning of the FHAA—"to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens."

The City's construction of the exemption would also undermine the purposes of the Anti-Drug Abuse Act, which was enacted two months after the FHAA by the same Congress explicitly to foster group homes for recovering alcoholics and addicts such as Oxford Houses. Through the Anti-Drug Abuse Act Congress "directly endorsed Oxford House itself as an organization worthy of public support because of its role in helping to stem the national epidemic of alcohol and drug abuse." *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 465 (D.N.J. 1992).

Thus, the City's broad construction of § 3607(b)(1) would nullify or negate (i) the broad protections generally afforded handicapped persons under the FHAA, (ii) Con-

¹⁵ That dismaying result cannot be avoided by arguing that an ordinance adopted with discriminatory intent could not be "reasonable" under § 3607(b)(1). "Reasonable" must mean something other than "nondiscriminatory," for a nondiscriminatory ordinance does not violate the Act and has no need for the exemption. Thus, because a discriminatory zoning ordinance would not necessarily be unreasonable under § 3607(b)(1), the City's construction could indeed immunize intentionally discriminatory ordinances.

gress's plainly expressed intent to reach rather than exempt zoning ordinances, (iii) its encouragement of group homes in residential communities for developmentally disabled persons, and (iv) the Anti-Drug Abuse Act's support for group homes such as Oxford Houses. Given these consequences, the City's construction should be adopted only if the language of § 3607(b)(1) clearly expresses Congress' intent effectively to deny or drastically restrict housing in thousands of communities across the country for handicapped persons who need to live in group homes. As we shall see, however, the words of § 3607(b)(1) look the other way.

C. The Language Of The Exemption Supports The Ninth Circuit's Construction.

On its face the statute says nothing about zoning ordinances. What Congress did exempt were—

“any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.”

As we noted above, that language read in isolation does not tell us whether Congress intended to exempt use restrictions found in zoning ordinances or health and safety related occupancy restrictions found in housing codes. The City and its supporting *amici* contend that the City's ordinance is exempt under a plain meaning analysis because, in defining families, the ordinance does have the effect of limiting the maximum number of unrelated people who may live in a house. As we have seen, however, that construction flies in the face of the overall language of the FHAA and the context in which it was enacted. It is also doubtful as a matter of textual analysis. Congress exempted only restrictions on “the maximum number of occupants,” not the maximum number of *some* categories of occupants but not others, and not “a” maximum applicable to some but not all occupants. The City's and its *amici*'s construction imputes to Congress a willingness to distinguish among prospective occu-

pants that is not revealed on the face of the statute. Hence their approach gives a debatable meaning to the words of § 3607(b)(1), construes an exemption to a remedial statute broadly rather than narrowly, and produces a result contrary to the Act's overall purposes.

By contrast, the Ninth Circuit's narrower construction of the exemption “best harmonizes with [the] context and promotes [the] policy and objectives of [the] legislature.” *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 n.10 (1991) (internal citation omitted). It is also supported by the language of § 3607(b)(1), which by employing the terms “occupants” and “occupy” is written in the terms of an “occupancy” restriction rather than a “use” restriction. As the Ninth Circuit noted, those two kinds of restrictions differ. Pet. App. A. at 2554-55 n.3. “Use” restrictions are embodied in zoning codes:

“Zoning is the process by which a municipality legally controls the *use* which may be made of property and the physical configuration of development upon tracts of land within its jurisdiction. Zoning ordinances are adopted to divide the land into different districts, and to permit only certain *uses* within each zoning district.” 1 Rohan, *Zoning and Land Use Controls* § 1.02[1], at 1-6 (1992) (emphasis added; footnotes omitted); see also *id.* § 1.02[1], at 1-7.

“Occupancy” restrictions, on the other hand, are generally set forth in housing codes:

“Housing codes * * * set minimum standards for the occupancy of residential units. Items covered in such codes may include minimum space per occupant, lighting and ventilation requirements, and specific sanitary and heating facilities. The major purpose of housing codes is to prevent overcrowding and the blighting of residential dwellings.” *Id.* § 1.02[6][c], at 1-34 to 35 (footnote omitted).

Use and occupancy restrictions arose from markedly distinct historical concerns and their different purposes have frequently been noted by courts and commentators.¹⁶

Section 3607(b)(1) reflects this distinction and is written in the language of a housing code. Indeed, at least one model housing code has remarkably similar language. Section 2.51 of the model code promulgated in 1986 by the American Public Health Association and Center for Disease Control defines the "[p]ermissible occupancy" of a dwelling as "the maximum number of individuals permitted to reside in a dwelling unit."¹⁷

The Secretary of Housing and Urban Development ("HUD"), who is charged with administering the Act and has jurisdiction over private occupancy restrictions (see p. 3, *supra*), also considers § 3607(b)(1) to exempt the kinds of occupancy limitations found in housing codes. HUD issued regulations implementing the FHAA that incorporated § 3607(b)(1) verbatim. 24 C.F.R. § 100.10(a)(3). The Preamble to the regulations explains that private sellers and lessors of real estate urged HUD to adopt a "national occupancy code" that they could enforce when state or local governments had failed to enact an occupancy restriction exempted by § 3607(b)(1). HUD declined to promulgate such a regulation, and in explaining why demonstrated its understanding of the kinds of restrictions that would be exempt:

"[T]he Department believes that in appropriate circumstances, owners and managers may develop and implement reasonable occupancy requirements based

¹⁶ For a full discussion of the differences between the two restrictions, including differences in the extent to which they have been used to discriminate against disfavored classes, see the Brief of the National Fair Housing Alliance as *Amicus Curiae* in Support of Respondents.

¹⁷ E. Mood, American Public Health Association—Centers for Disease Control, *Recommended Minimum Housing Standards* (1986).

on factors such as the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit." 24 C.F.R. ch. I, subch. A, App. I.

In short, there is every reason to believe that, when it preserved the applicability of "restrictions regarding the maximum number of occupants permitted to occupy a dwelling," Congress intended to adopt this common interpretation of maximum occupancy restrictions as establishing a maximum number of occupants based on the amount of space in the dwelling—regardless of the character of that occupant—to prevent the health and safety problems caused by overcrowding.¹⁸

The Ninth Circuit's interpretation also gives consistent meaning to the word "restriction" in § 3607(b)(1), whether it is a "local, State, or Federal" restriction. Regulation of property uses through zoning ordinances is principally a local phenomenon. Neither state governments nor the federal government typically regulates the number of permissible occupants of a dwelling under land use regulations. State governments do, however,

¹⁸ The Court should accordingly reject the City's contention (Pet. Br. 8, 11) that the words "occupants" and "occupy" reflect Congress' intent to exempt single family zoning ordinances because this Court referred to such ordinances as "occupancy" restrictions in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *Moore* was not construing a statute, and in fact the opinions in that case recognized the distinction between zoning ordinances and the square-footage type of restriction that the Ninth Circuit ruled § 3607(b)(1) was actually meant to cover. See 431 U.S. at 500 n.7 ("another ordinance * * * limits population density directly, tying the maximum permissible occupancy of a dwelling to the habitable floor use") (opinion of Powell, J., joined by Brennan, Marshall, and Blackmun, JJ.); *id.* at 520 n.16 ("East Cleveland had on its books an ordinance requiring a minimum amount of floor space per occupant in every dwelling") (Stevens, J., concurring in the judgment); *id.* at 539 n.9 (noting that the city's housing code provision, in contrast to its zoning ordinance, "is directed not at preserving the character of a residential area but at establishing minimum health and safety standards.") (Stewart and Rehnquist, JJ., dissenting).

regulate permissible occupancy based on health and safety concerns, sometimes by adopting the Uniform Housing Code and its square footage occupancy restrictions.¹⁹ And different agencies of the federal government impose similar restrictions in connection with their administration of various housing programs.²⁰ Construing § 3607(b)(1) as the Ninth Circuit did imparts the same generic mean-

¹⁹ See Cal. Health & Safety Code § 17922 (Deering 1994); Iowa Code § 364.17 (1993); Mont. Admin. R. 8.70.102 (1994); Nev. Rev. Stat. Ann. § 461.170 (Michie 1993); Or. Rev. Stat. § 455.410 (1993); see also Brief of the American Planning Association as *Amicus Curiae* in Support of Respondents.

Section 503(b) of the Uniform Housing Code states that bedrooms "shall have an area of not less than 70 square feet" and that "[w]here more than two persons occupy a room used for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." Jt. App. at 180.

²⁰ For example, to ensure that buildings used in its Section 8 lower-income housing program are "decent, safe, and sanitary," 42 U.S.C. § 1437f(o)(5), HUD regulations require that a "dwelling unit shall afford the Family adequate space and security," 24 C.F.R. § 882.109(c), and that:

"The dwelling unit shall contain a living room, kitchen area, and bathroom. The dwelling unit shall contain at least one bedroom or living/sleeping room of appropriate size for each two persons. Persons of opposite sex, other than husband and wife or very young children, shall not be required to occupy the same bedroom or living/sleeping room." Id. § 882.109(c)(2); see also id. §§ 886.113(c), 887.251(c) (imposing like requirements).

Similarly, the Employment and Training Administration of the Department of Labor has established space requirements for agricultural housing. See 20 C.F.R. § 654.407(c)(1)-(3) (imposing 40, 50, and 60 square foot requirements for different living conditions). And the Farmers' Home Administration of the Department of Agriculture, in the management of Rural Rental Housing projects, has issued similar health and safety oriented regulations. See 7 C.F.R. Part 1930, Subpt. C, Exh. B (no more than "2 people per *habitable sleeping room*," unless "a *habitable sleeping room* provides at least 50 square feet per person") (emphasis in original).

ing to the term "restriction" whether it is a "State restriction" or a "Federal restriction" or a "local restriction." That satisfies the canon of construction that "a word is presumed to have the same meaning" throughout a statute. *Morrison-Knudsen Constr. Co. v. Director, OWCP*, 461 U.S. 624, 633 (1983).

Several *amici curiae* contend that the City's broad construction is compelled by the word "any" in § 3607(b)(1), arguing that its presence means that Congress meant to exempt all restrictions whether found in use ordinances or housing codes.²¹ But that is too much weight for that word to bear. If it were absent we doubt that *amici's* arguments about § 3607(b)(1) would change, and in any event "a single word cannot be read in isolation." *Smith v. United States*, 113 S. Ct. 2050, 2056 (1993). "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purpose from the setting in which they are used * * *." *King v. St. Vincent's Hosp.*, 112 S. Ct. 570, 574 (1991) (internal citation omitted).

We believe that the word "any" says little if anything about the kinds of restrictions Congress meant to exempt. The word may represent the drafters' wish to underscore that State *and* Federal *and* local restrictions were covered; alternatively, it may mean "any" kind of true occupancy restriction, whether expressed in terms of allowable persons per square foot or per bedroom or other living space.²² But in all events the word "any" should not be construed to singlehandedly demonstrate an otherwise unexpressed congressional intent to exempt thousands of single family

²¹ Brief of Township of Upper St. Clair, at 6-8; Brief of Lubbock, Texas at 4; Brief of International City/County Management Assoc., *et al.*, at 11.

²² Cf. the HUD Preamble, p. xx, *supra*, describing appropriate restrictions in terms of "the number and size of sleeping areas or bedrooms and the overall size of the dwelling unit."

zoning ordinances covering the areas presumptively most important to handicapped persons requiring congregate living arrangements.²³

Nor, contrary to the view of one *amicus curiae*, does the exemption in § 3603(b) of the Act for some single family dwelling owners support the City's interpretation.²⁴ Congress' willingness in that section to exempt *some* individual owners who decline to sell or rent to the classes of persons covered by the Act may remove a limited number of dwellings from the reach of handicapped persons. But that narrow exemption does not remotely suggest that Congress intended in § 3607(b)(1) to permit a city to remove an entire community of houses from the reach of groups of handicapped persons.

D. The Reasonableness Requirement Of § 3607(b)(1) Supports The Ninth Circuit's Construction.

Section 3607(b)(1) exempts only "reasonable" restrictions on maximum occupancy. "Reasonable" is a relative term, dependant on the context and circumstances in which it is used. Given the overall purposes of the Act, and the

²³ In other cases this Court has refused to read "any" literally when doing so would make no sense in the context of the overall statutory scheme. See *Georgia v. Rachel*, 384 U.S. 780, 792 (1966) (construing the language "any law providing for * * * equal civil rights" in 28 U.S.C. § 1443 to mean only laws "providing for specific civil rights stated in terms of racial equality"); *McNally v. United States*, 483 U.S. 350 (1987) (holding that "any scheme or artifice to defraud" does not include a scheme to deprive one of intangible rights); see also *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 634-35 (1979) (Powell, J., concurring, joined by Burger, C.J. and Rehnquist, J.) (statutory reference to "any law of the United States" refers only to equal rights laws).

²⁴ Brief of Township of Upper St. Clair, at 15-16. Section 3603(b)(1) provides that the Act does not apply to the sale or rental of a single family dwelling provided that the owner owns three or fewer such dwellings and does not use the services of a broker in the sale or rental. 42 U.S.C. § 3603(b)(1).

limited kinds of restrictions we have shown Congress meant to exempt, whether an occupancy restriction is reasonable within the meaning of § 3607(b)(1) ought to turn on whether it is drafted to serve the health and safety concerns typically addressed in uniform housing codes. That is a simple test to administer.

By contrast, it is difficult to fashion an appropriate test for "reasonableness" if Congress meant for § 3607(b)(1) to exempt zoning ordinances like the City's. The City and several of its supporting *amici* ask the Court to apply "the constitutional reasonableness standard of the Fourteenth Amendment Due Process and Equal Protection Clauses." Pet. Br. at 10, 11.²⁵ Their position seems to be that, if a zoning ordinance is constitutional, it is exempt from the Fair Housing Act. If that were true it would mean that the FHAA gave handicapped persons needing to live in group homes no protection the Constitution did not already provide, and that Congress intended the Act to reach only unconstitutional ordinances, which would make no sense. And it would mean that municipalities could exclude group homes for handicapped persons altogether, which, as we have shown above, would be contrary to Congress' intent.

Uncomfortable with that result, the City tries to narrow it by contending that a single family ordinance covering an entire city would not be reasonable because "it would result in the total exclusion of the group homes for the disabled from the community." Pet. Br. at 18. But the ordinance held constitutional in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), limited to two the number of unrelated persons who could reside in a dwelling, thus excluding all group homes. Hence the City's two contentions—that constitutional ordinances are exempt but wholly exclusory ones are not—contradict each other.

²⁵ See also Brief of the International City/County Management Assoc., *et al.*, at 15 n.7; Brief of Pacific Legal Foundation, at 13-15; Brief of City of Mountlake Terrace, Washington, at 7-8; Brief of City of Fultondale, Alabama, at 7-9.

Moreover, the City and its *amici* conflate the question whether an ordinance is exempt with the question whether it violates the substantive prohibitions of the Act. The City's defense of its ordinance as generally accepting of handicapped persons, and *amici*'s arguments that the ordinance reflects a reasonable balancing of various factors and is more generous to group homes than the ordinance upheld in *Village of Belle Terre*,²⁶ all essentially contend that an ordinance is reasonable within § 3607(b)(1) if it does not discriminate. Those arguments impermissibly equate "reasonable" with "nondiscriminatory." As we noted above (note 15), whether an occupancy restriction is reasonable under § 3607(b)(1) cannot turn on whether it is discriminatory, for Congress had no need to exempt occupancy restrictions that do not discriminate and thus by definition do not violate the Act. Hence the City's and its *amici*'s portrayal of the ordinance as fair to handicapped persons, while possibly relevant to the question whether it violates the Act, has no bearing on the question whether it is "reasonable" and thus exempt under § 3607(b)(1).

If the reasonableness of an ordinance *does* turn on the degree to which it discriminates, consider the issues courts will be called upon to resolve. The City asserts that an ordinance that totally excluded group homes from the community would be unreasonable, but that its ordinance, said to cordon off only 75 percent of housing, is not. (In fact the more accurate figure is 97 percent.²⁷) By

²⁶ Pet. Br. at 28-30; Brief of International City/County Management Assoc., *et al.*, at 15; Brief of Pacific Legal Foundation, at 13-15.

²⁷ The City variously states that 186 or 258 single-family rental houses are available to Oxford House in the City's multi-family zones (Pet. Br. at 5, 27). Neither number is accurate. 258 is the total number of single family residences in the multi-family zones (Jt. App. at 113); only some of them are rental properties. As the City notes (Pet. Br. at 27, citing Jt. App. at 122), there are 8,550 single family housing units throughout the City, of which 967, or 11.3%, are rental properties. Applying the same percentage

what yardstick is a total exclusion unreasonable but a near total exclusion acceptable? Does it matter whether the area open to disabled persons is run down, or the site of illicit drug activity and other crime? The City defends the areas in which it would allow an Oxford House to locate, arguing that the record contains no evidence that they "are in any way unsuited to Oxford House's program." Pet. Br. 27, 31. It is hard to believe that Congress intended that, in considering whether a restriction falls within § 3607(b)(1), a court would have to take evidence on such issues.

In short, the difficulty of divining an appropriate test for the reasonableness of a zoning ordinance under the City's construction of § 3607(b)(1)—a test that does not equate reasonableness with "constitutional" or "discriminatory" and that would not collapse the exemption issue into the merits—further supports the Ninth Circuit's construction.²⁸

to the 258 single family houses in multi-family zones shows that only 29 houses are rental properties. Thus the City has declared off limits 97% of the single family homes available for rent. (29=3% of 967). With 97% of the potential housing stock off-limits, the chances of finding a house that is large enough, suitably located, and vacant are virtually nil.

²⁸ Even as a merits defense to a charge of discrimination, the City's argument that a court should consider the availability of other housing for handicapped persons badly misconstrues the Act. Shunting group homes to alternative housing in a different neighborhood is inconsistent with the goals of deinstitutionalization and does not provide "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B); see also 24 C.F.R. § 100.204(b) (HUD's examples of reasonable accommodations under the Act focus on the specific dwelling desired by the disabled person). Rather, "[a]nti-discrimination laws are designed to prevent just such discriminatory segregation." *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991); see also *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) ("[T]he issue is not whether any housing was made available to [the handicapped individual], but whether she was denied the housing she desired on impermissible grounds."); *Horizon House Developmental Servs., Inc.*, 804 F. Supp. at 698 ("[T]he FHAA rejects any notion that a

E. The Ninth Circuit's Construction Will Not Destroy Single Family Zoning Ordinances.

The City contends that the Ninth Circuit's interpretation if accepted will "overturn Euclidian zoning," "destroy the effectiveness and purpose of single-family zoning," and "destroy the basic building block of zoning." Pet. Br. at 11, 25, 30. Several *amici curiae* sound similar alarms.²⁹ But those apocalyptic views have no basis. To say that single family zoning ordinances are not exempt from the Act is not to strike them down. It means only that they may be challenged under the Act's prohibitions against discrimination found in § 3604(f)(1)-(3). A zoning ordinance could be struck down entirely only upon proof that it was enacted or enforced with discriminatory intent,³⁰ or produced a disparate impact on disabled persons,³¹ and the more likely claim by handicapped persons requiring a group home is the narrower one made in this case, that the City has violated § 3604(f)(3)(B) by refusing to make a reasonable accommodation in its ordinance. If the decision below is affirmed, and on remand the respondents prove their claim, the City will be required only to make an exception to its ordinance for the residents of Oxford House-Edmonds. It will remain otherwise

Township can somehow avoid the anti-discrimination mandate by accepting some sort of 'fair share' or apportionment of people with disabilities." Accordingly, what the City views as magnanimity—its consideration during this litigation of where to permit group homes and its relegation of them to areas zoned for multifamily housing only (see Pet. Br. at 5, 21)—may instead reflect intentional discrimination against persons with disabilities.

²⁹ See Brief of City of Fultondale, Alabama, at 6 ("Fultondale finds its legally legislated zoning ordinance being destroyed!"); Brief of Pacific Legal Foundation, at 29 (Ninth Circuit's interpretation "leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions").

³⁰ Cf. *United States v. City of Parma*, 661 F.2d 562 (6th Cir. 1981 (striking down a racially discriminatory ordinance)).

³¹ Cf. *Metropolitan Housing Dev. Corp.*, 558 F.2d at 1290; *Horizon House Developmental Servs., Inc.*, 804 F. Supp. at 697-98.

free to enforce its ordinance against other group homes such as college fraternities and boarding houses.

Nor, contrary to the suggestion of one *amicus curiae*,³² will the Ninth Circuit's construction impair the quality of life in single family neighborhoods. Numerous studies have evaluated the actual impact of group homes on their surrounding communities. Their findings are consistent: the presence of group homes in the areas studied has not lowered property values or increased the rate of turnover; has not increased crime; and has not changed the character of the neighborhood. Nor have the homes deteriorated or become conspicuous institutional landmarks. Communities have come to accept them, and group home residents have benefitted from access to community life.³³

These findings do not turn on the nature of the disability involved. The studies have addressed group homes for persons who are mentally retarded or developmentally disabled, mentally ill, elderly, recovering drug addicts and alcoholics, ex-offenders, and a variety of combinations thereof.³⁴

³² Brief of Pacific Legal Foundation, at 13-14.

³³ See Community Residences Information Services Program of White Plains, N.Y., *There Goes the Neighborhood . . . A Summary of [58] Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes in Neighborhoods in Which They Are Placed: Declining Property Values, Crime, Deteriorating Quality of Life, and Loss of Local Control* (Normann ed. 1990) ("There Goes the Neighborhood"); see also in Lauber, *Impacts of Group Homes on the Surrounding Neighborhood: An Evaluation of Research* (Planning/Communications Aug. 1981) ("Impacts of Group Homes").

³⁴ See Human Services Research Institute, *Becoming a Neighbor: An Examination of the Placement of People with Mental Retardation in Connecticut Communities* (Mar. 1988), summarized in *There Goes the Neighborhood* at 29 (literature review revealing that group homes for the mentally retarded have no impact on property values, selling time or property turnover rates, nor on the character of the neighborhood or the crime rate); Lauber, *Impacts on the Surrounding Neighborhood of Group Homes for Persons with Developmental Disabilities* (Planning/Communications Sept. 1986).

F. The Ninth Circuit's Construction Is Not Inconsistent With This Court's Rulings On The Constitutionality Of Single Family Zoning Ordinances.

The City contends that § 3607(b)(1) "must be interpreted in the context of the U.S. Supreme Court's consistent direction in the field of single-family zoning." Pet. Br. at 11. It and various *amici* argue that, because this Court has recognized the broad zoning power of local

(group homes for the developmentally disabled do not affect the value of residential property or the stability of the surrounding neighborhood; group home residents pose no threat to neighborhood safety); Ryan, *An Examination of the Knowledge, Attitudes and Relationships of Selected Neighbors Toward Community Residential Facilities for the Developmentally Disabled in Westchester County, New York* (Oct. 1986) (unpublished dissertation, New York University), summarized in *There Goes the Neighborhood* at 70 (lack of impact on the neighborhood of community residential facilities for the developmentally disabled); *Impacts of Group Homes*, at 1 (proximity of group homes for mentally retarded/developmentally disabled, prison pre-parolees, mentally ill or recovering addicts and alcoholics has no effect on market values or turnover; maintenance of group homes is generally better than that of surrounding properties; group homes are consistent and compatible with the size and type of neighboring structures; and group homes have no effect on local crime); Louisiana Center for Public Interest, *Impact of Group Homes on Property Values in the Surrounding Neighborhoods* (Feb. 1981), summarized in *There Goes the Neighborhood* at 49 (survey of mental health homes, alcohol and drug centers, and ex-offender halfway houses in variety of neighborhoods found no decline in neighborhood character or property value; homes were integrated, well-maintained and inconspicuous); Sigelman et al., *Community Reactions to Deinstitutionalization: Crime, Property Values and Other Bugbears*, J. Rehabilitation 52 (1979) (evidence indicates that crime rates do not increase in neighborhoods with residential facilities for the handicapped, property values do not decline, turnover rates do not increase, neighborhood lifestyles are not altered, resident/neighbor contacts are rarely negative, and neighbors become more favorably disposed toward facilities and their residents as a result of first-hand experience); City of Lansing Planning Dep't, *The Influence of Halfway Houses and Foster Care Facilities Upon Property Values* (Oct. 1976), summarized in *There Goes the Neighborhood* at 9 (no relationship between presence of a halfway house or foster home for ex-alcoholics, adult ex-offenders, youth offenders or mentally retarded and property values in the surrounding neighborhood).

governments and has upheld the constitutionality of single-family zoning ordinances under the Equal Protection Clause, *Village of Belle Terre*, Congress could not have intended to make such ordinances subject to the non-discrimination mandates of the Fair Housing Act. *Id.* at 9-11.³⁵ But the Ninth Circuit correctly held that "the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance." Pet. App. A at 2565.

There can be no doubt of Congress' power to regulate even constitutional single family zoning ordinances. While Congress may not take away rights granted by the Constitution, it is certainly free to confer additional rights,³⁶ which is precisely what it did in the FHAA. As the Ninth Circuit noted, "Congress intended city zoning policies to reasonably accommodate handicapped persons * * * [which] can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances."³⁷ Indeed, long before the 1988 Amendments, the Eighth Circuit noted that a constitutional ordinance could run afoul of the Fair Housing Act: "The discretion of local zoning officials, recently recognized in *Village of Belle Terre* * * * must be curbed where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods' " in violation of the Act. *United States v. City of Black Jack*, 508 F.2d 1179, 1184 (8th Cir. 1974). The Tenth Circuit more recently made the same point in a case involving handicapped persons:

³⁵ See Brief of Pacific Legal Foundation at 8-9, 16-17; Brief of International City/County Mgmt. Assoc., et al., at 15-17.

³⁶ See *City of Rome v. United States*, 446 U.S. 156, 177-78 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

³⁷ Pet. App. A at 2565-66; see also *Horizon House*, 804 F. Supp. at 695 n.6 ("the standard under the FHAA is a higher level of scrutiny than rational basis test applied to an equal protection analysis"); *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1295 n.8 (D. Md. 1993) (same).

"[T]he use of an Equal Protection analysis is misplaced here because this case involves a federal statute and not the Fourteenth Amendment. * * * Moreover, the FHAA specifically makes the handicapped a protected class for purposes of a statutory claim—they are the direct object of the statutory protection—even if they are not a protected class for constitutional purposes."

Bangerter v. Orem City Corp., No. 92-4150, 1995 U.S. App. LEXIS, at 471 *33-34 (10th Cir., Jan. 11, 1995). In short, this Court's constitutional rulings offer no support for the City's broad construction of § 3607(b)(1).

The City also contends that its ordinance comes within the exemption because if it imposed a five-person limit on traditional family members it would violate the Due Process Clause, which requires family members to go unregulated. Pet. Br. at 22. That argument stands up only if Congress intended § 3607(b)(1) to exempt zoning ordinances. No constitutional problem arises if Congress meant to exempt only occupancy limitations expressed in person-per-square-foot or person-per-bedroom terms. No case of which we are aware has ever suggested that the Constitution would forbid the application to families of such historic, evenly drawn, true occupancy restrictions.³⁸ Indeed, *Moore* strongly suggests the contrary.³⁹

³⁸ "[T]he family is not beyond regulation." *Moore*, 431 U.S. at 499 (plurality opinion). See, e.g., *Prince v. Massachusetts*, 321 U.S. 158 (1944) (upholding constitutionality of law forbidding parent from causing child to violate the child labor laws); *Lyng v. Castillo*, 477 U.S. 635 (1986) (upholding federal regulations defining "household" to exclude relatives living outside nuclear family unless they customarily purchased food and prepared meals together).

³⁹ *Moore* struck down a zoning ordinance that limited occupancy to a few categories of relatives on the ground that it only marginally furthered its goal of preventing overcrowding. The plurality opinion found it "significant that East Cleveland has another ordinance specifically addressed to the problem of overcrowding," one that limited "population density directly [by] tying the maximum permissible occupancy of a dwelling to the habitable floor area." 431 U.S. at 500 n.7 (Opinion of Powell, J., joined by Brennan,

G. Summary.

The words of § 3607(b)(1), read alone, do not immediately endorse either the City's broad or the Ninth Circuit's narrow construction. But the Ninth Circuit's view finds persuasive support in the words of the statute and it gives the exemption a meaning that is most in accord with the overall structure and purpose of the FHAA and related federal legislation. Accordingly, even assuming that the City has an equal claim for its interpretation based solely on the plain language of § 3607(b)(1), the Ninth Circuit's construction should be adopted, for the Fair Housing Act is to be given a "generous construction," *Trafficante*, 409 U.S. at 212; exemptions to remedial statutes should be read narrowly; and it is "well settled doctrine * * * to read a statute, assuming that it is susceptible of either of two opposed interpretations, in the manner which effectuates rather than frustrates the major purpose of the legislative draftsmen." *Shapiro v. United States*, 335 U.S. 1, 31 (1948).

We recognize, however, that the Ninth Circuit found the statute ambiguous, and that there is an inter-circuit conflict on the meaning of the exemption. Accordingly, we turn now to the legislative history. As we shall see, it closes the door on the City's argument.

II. THE LEGISLATIVE HISTORY CONFIRMS THAT THE NINTH CIRCUIT'S CONSTRUCTION IS CORRECT.

The sole congressional report on the FHAA is H.R. Rep. No. 711, 100th Cong., 2d Sess. (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173 ("H.R. Rep. No. 711"). That Report, which accompanied the bill enacted into

Marshall, and Blackmun, JJ.). That opinion at least implicitly acknowledged the constitutionality of true occupancy restrictions applied to families. See also *id.* at 520 n. 16 ("To prevent overcrowding, a community can certainly place a limit on the number of occupants in a household, either in absolute terms or in relation to the available floor space.") (Stevens, J., concurring in the judgment).

law, is "the authoritative [legislative history] source for finding the Legislature's intent" because it represents "the considered and collective understanding of those Congressmen involved in drafting and studying proposed legislation." *Garcia v. United States*, 469 U.S. 70, 76 (1984) (citation omitted).

Legislative history is often ambiguous and inconclusive. But in this case the House Report expressly supports the conclusions we reached in Part I above. It records Congress' belief that "[t]he right to be free from housing discrimination is essential to the goal of independent living" (H.R. Rep. No. 711 at 18; Jt. App. at 135), and its intent to foster "the ability of [handicapped] individuals to live in the residence of their choice in the community." *Id.* at 24; Jt. App. 148. It shows that Congress intended the Act to reach zoning ordinances in general and in fact actually targeted zoning ordinances that bar handicapped persons from residing in congregate living arrangements:

"[The provisions outlawing discrimination against handicapped persons] would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps. While state and local governments have authority to protect safety and health, and to regulate use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements *on congregate living arrangements among non-related persons with disabilities*. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities.

"The Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." *Id.* at 24;

Jt. App. at 147-48 (footnote omitted; emphasis added).

This passage confirms that Congress did not intend to permit communities to bar group homes for handicapped persons.⁴⁰ Congress' intent is also revealed by its rejection of an amendment that would have legislated the very interpretation proposed by the City. Before the House Judiciary Committee reported out the bill that became the FHAA, Representative Swindall proposed an amendment to exempt decisions by local governments "to zone real property as available for certain uses, such as commercial development or single-family homes" or to "grant or refus[e] to grant a variance," unless such zoning decision was made with an intent to discriminate. See H.R. Rep. No. 711 at 89, *reprinted in* 1988 U.S.C.C.A.N. at 2224 (additional views of Reps. Swindall and 5 others). The amendment was rejected, and its supporters voted

⁴⁰ Because the footnote in this passage cites *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985), the City contends that "Congress was trying to address a problem" presented by facially discriminatory ordinances like the one at issue in that case, and that its facially neutral ordinance must therefore be exempt under § 3607(b)(1). Pet. Br. at 19-21. The argument mistakenly assumes that Congress was discussing § 3607(b)(1) in that passage. *Id.* at 19. In fact the passage has nothing to do with the exemption, but instead explains the justification for some of the Act's anti-discrimination provisions. Moreover, in another passage following shortly thereafter, Congress specified that the Act *would* apply to facially neutral ordinances:

"Another method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities. * * * These and similar practices would be prohibited." H.R. Rep. No. 711 at 24, Jt. App. at 148-49 (footnote omitted).

That passage, and Congress' rejection of a proposed amendment to exempt all but intentionally discriminatory ordinances (see text, *infra*), shows that the neutrality of the City's ordinance does not even mean that it complies with the Act, much less that it falls within the exemption.

against the FHAA because of the FHAA's "impact on state and local government zoning authority." *Id.*

Moreover, the legislative history shows that Congress meant to assure, not deny, handicapped persons access to "American life" and "the American mainstream," which surely includes the thousands of single family zoned communities in America. Thus the House Report states:

"Prohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice.

"The [FHAA], like Section 504 of the Rehabilitation Act of 1973, as amended, is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711 at 18; Jt. App. 134 (footnote omitted).⁴¹

And finally, the legislative history confirms that Congress' use of the words "occupy" and "the maximum number of occupants" in § 3607(b)(1) was intended to exempt "occupancy" restrictions that apply to all occupants to prevent health and safety problems caused by overcrowding, and not "use" restrictions. The House Report states:

"Section [3607(b)(1)] amends [the Act] to make additional exemptions relating to the familial status provisions. These provisions are not intended to limit the applicability of any reasonable local, State, or

⁴¹ The Report also recognizes the status of recovering drug addicts as handicapped (and, by implication, recovering alcoholics as well), and their need for stable housing:

"Just like any other person with a disability, such as cancer or tuberculosis, former drug-dependent persons do not pose a threat to a dwelling or its inhabitants simply on the basis of status. Depriving such individuals of housing, or evicting them, would constitute irrational discrimination that may seriously jeopardize their continued recovery." H.R. Rep. No. 711 at 22; Jt. App. at 144.

Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. Rep. No. 711 at 31; Jt. App. at 162-63 (emphasis added).

The first sentence in that passage suggests that Congress may have enacted § 3607(b)(1) in response to a concern that the new familial status provisions would be interpreted to preclude landlords from enforcing occupancy restrictions to prevent overcrowding, and some commentators believe that the exemption saves occupancy restrictions *only* insofar as they limit the number of family members who may occupy a dwelling. See Mandelker, Gerard & Sullivan, *Federal Land Use Law*, § 3.09[2] (ed. 1993). While § 3607(b)(1) on its face does not mention familial status discrimination, this view of its origin strengthens the conclusion, borne out by the rest of the passage, that Congress intended to exempt only true occupancy restrictions—that is, those "based on a minimum number of square feet in the unit or the sleeping areas of the unit" and "applied to all occupants." See also 133 Cong. Rec. S2261 (daily ed. Feb. 19, 1987) (statement of Sen. Metzenbaum) ("The bill does not prevent governments from imposing safety and health related limitations on the number of persons who may occupy a housing unit.").

In short, the legislative history leads down a single path to the conclusion, reached earlier on consideration of statutory language alone, that the Ninth Circuit's construction of § 3607(b)(1) is correct.

III. THE CITY'S ORDINANCE IS NOT AN OCCUPANCY RESTRICTION WITHIN THE MEANING OF § 3607(b)(1).

The City's ordinance is not exempt under § 3607(b)(1). By its own terms it is a "use" restriction, not an "occupancy" restriction. "Permitted Primary Uses" in the zone where Oxford House-Edmonds is located are limited to "[s]ingle-family dwelling units" (ECDC § 16.20.010 (emphasis added)) and, as the City itself accurately observes (Pet. Br. at 3), "ECDC Section 21.30.010 FAMILY defines 'family' for the purposes of the 'use' provisions of the code." Nothing in the record suggests that the City's ordinance was enacted to serve the kind of health and safety related concerns that are met by true occupancy restrictions expressed in terms of allowable persons per square foot of living space or sleeping areas.⁴² Moreover, the City has elsewhere adopted such a restriction, prescribing specific square footage requirements "[w]here more than two persons occupy a room used for sleeping purposes." See ECDC § 19.10.000, adopting the 1991 Uniform Housing Code, ch. 5, § 503(b); Jt. App. at 248. That restriction *would* be exempt under § 3607(b)(1), and its adoption by the City further demonstrates the distinction between zoning "use" ordinances and the kind of true occupancy restrictions Congress meant to exempt.

IV. ELLIOTT v. CITY OF ATHENS WAS WRONGLY DECIDED.

Elliott v. City of Athens, 960 F.2d 975 (11th Cir. 1992), the conflict-creating decision in this case, held that a zoning ordinance similar to the one at bar was exempt as a reasonable occupancy restriction.⁴³ Like the

⁴² The City did not legislate based upon any finding of differential impact on its services or infrastructure; rather, its decision to limit the definition of "family" to five or fewer unrelated persons is not explained by any legislative findings. Jt. App. at 108-09.

⁴³ The ordinance limited an area of the City of Athens to single-family use and defined family in essence as one or more persons

City in this case, the Eleventh Circuit reasoned that this Court's constitutional rulings on the subject of single family zoning ordinances somehow show that Congress meant to exempt such ordinances under § 3607(b)(1). *Id.* at 980. That reasoning is unpersuasive for the reasons given above at pp. 38-40. The Eleventh Circuit also erred in believing that its ruling was warranted by the prevalence and utility of ordinances distinguishing related from unrelated persons.⁴⁴ In fact, to the extent that such distinctions have been used to discriminate against group homes for persons with disabilities, their prevalence may be seen to have galvanized Congress into forbidding them. That is just what the House Report shows. See *supra* p. 42.

The Eleventh Circuit then engaged in a constitutional reasonableness analysis, setting the municipality's interests in controlling density, traffic, and noise and in preserving the residential character of the neighborhood against the interests of persons with disabilities in remaining free from a discriminatory zoning restriction. 960 F.2d at 981-84. The court found the evidence of disparate impact insufficient to render unreasonable "an otherwise reasonable zoning restriction." *Id.* at 984. This conclusion suffers from the infirmities we identified above: it equates "reasonable" under § 3607(b)(1) with "constitutional" and "nondiscriminatory," and it confuses the issues of compliance with the issue of exemption.

Moreover, the court profoundly misinterpreted the exemption in ruling that it "is an attempt on the part of

related by blood, marriage or adoption or no more than four unrelated persons. 960 F.2d at 976.

⁴⁴ The Eleventh Circuit noted the importance of "commonplace" unrelated-persons limitations to a college town like Athens. 960 F.2d at 980 & n.6, 982. But as we noted earlier (p. 36), the existence of those limitations is not at stake here. Even if on remand Oxford House-Edmonds obtains a reasonable accommodation of the City's ordinance, the City will remain free to control the number of unrelated college students who may rent a single dwelling.

Congress to advance the interests of the handicapped without interfering seriously with reasonable local zoning," and that, because there were other areas in the city available for group homes, the city had "preserved meaningful access for group homes for handicapped persons in its residential areas." *Id.* at 983. As we showed earlier (pp. 42-44), Congress *did* intend to interfere with local zoning because of its history of excluding persons with disabilities, particularly those needing congregate living arrangements. Moreover, the FHAA does not guarantee "meaningful" access to group housing generally: it requires "equal opportunity to use and enjoy *a dwelling*." 42 U.S.C. § 3604(f)(3)(B) (emphasis added). Thus, as demonstrated above (note 28), a city contravenes rather than satisfies the mandates of the FHAA when it segregates group homes for persons with disabilities into specific neighborhoods.

In sum, *City of Athens* approached and adjudicated an issue of statutory construction as if it were engaged in appraising a State statute under a lenient constitutional standard. It confused the question whether the city's ordinance violated the Act with the question whether it qualified as exempt under § 3607(b)(1), ascribed to Congress an overly tolerant attitude towards zoning ordinances that exclude group homes, and construed the Act to defeat rather than serve its purposes by allowing cities to segregate group homes or exclude them altogether. For these reasons *City of Athens* was wrongly decided and should not be adopted.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

ROBERT I. HELLER
RIDDELL, WILLIAMS, BULLITT
& WALKINSHAW
1001 4th Avenue Plaza
Seattle, Washington 98154
(206) 624-3600

STEVEN R. SHAPIRO
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION
132 West 43rd Street
New York, N.Y. 10036
(212) 944-9800

WILLIAM F. SHEEHAN
(Counsel of Record)
ELIZABETH M. BROWN
DAVID E. JONES
SHEA & GARDNER
1800 Massachusetts Avenue, N.W.
Washington, D.C. 20036
(202) 828-2000

JOHN P. RELMAN
WASHINGTON LAWYERS' COMMITTEE
FOR CIVIL RIGHTS AND
URBAN AFFAIRS
1300 19th Street, N.W., Suite 500
Washington, D.C. 20036
(202) 835-0031

Counsel for Respondents

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FOR ARGUMENT

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In The
Supreme Court of the United States
October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING
CODE COUNCIL, et al.,

Respondents,

and

UNITED STATES OF AMERICA

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITIONER'S REPLY BRIEF ON THE MERITS

W. SCOTT SNYDER*
OGDEN MURPHY WALLACE
2100 Westlake Center Tower
1601 5th Avenue
Seattle, WA 98101
(206) 447-7000
*Counsel of Record

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QUESTION PRESENTED

Is traditional single-family zoning patterned on the decisions of the United States Supreme Court exempt from coverage under the Fair Housing Act Amendments as a reasonable local restriction on the maximum number of occupants permitted to occupy a dwelling where there is no evidence of an intent to discriminate against the disabled and reasonable provision is made in other zoning districts for group home uses?

PARTIES TO THE PROCEEDING

City of Edmonds, Washington
 United States of America
 Oxford House-Edmonds
 Oxford House, Inc.
 Herb Hamilton
Parties Dismissed¹

¹ The following original parties have been dismissed by order of the District Court: Washington State Building Code Council; City of Everett, Washington; Oxford House-Hoyt; United States - Department of Housing and Urban Development; Jack Kemp and Richard L. Bauer.

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SECTION I. STATEMENT OF REPLY ARGUMENT

The federal courts have deferred to local wisdom in the creation of zoning classifications as a reasonable exercise of local police powers since zoning was first reviewed by this Court in *Euclid* in 1926. Such an exercise of traditional police power carries with it a strong presumption against federal preemption. This presumption should be considered by this Court as it determines the plain meaning of the exemption to the Fair Housing Act Amendments ("FHAA") created by 42 U.S.C. § 3607(b)(1) ("the exemption").

Respondents assert that the exemption to the FHAA for reasonable local occupancy limits should be strictly construed due to the nature of the FHAA as a remedial statute. There is a stronger, more applicable history of federal deference to local zoning powers to which this Court should adhere. The Court prescribed preemption of state and local police power regulations absent "strong," "unambiguous" statutory language stating Congress' intent. From its inception, local zoning has been categorized by this Court as an exercise of police power. There is a strong tradition of deference to local zoning by the federal courts at all levels. The FHAA contains both an expressed preemption of local zoning laws which conflict with the Act as well as an exemption for reasonable local occupancy limits. Therefore, Petitioner believes that this Court should apply the presumption against preemption of traditional state powers and focus on the plain meaning of exemption.

Respondents United States and Oxford House disagree as to whether the meaning of the exemption created

42 U.S.C. § 3607(b)(1) is clear. Regardless both resort not only to the Committee Report but to the individual comments of legislators. Such passing comments whether by members of Congress in debate or a legislation's sponsor are neither controlling nor instructive in light of the plain meaning of the exemption.

The Briefs of Amicus Curiae in support of the Respondents' position raise many valid policy considerations. Such policy considerations are for Congress, however, and not the Courts because they are at odds with the plain meaning of the exemption.

The policy arguments of Respondents and their Amicus Curiae concern hypotheticals in favor of worthy programs established for the benefit of recovering drug addicts, alcoholics, the elderly, and other groups of disabled persons. Their concerns and their hypotheticals are misplaced. This is not a case of exclusionary zoning but of reasonable classification. Group homes of a sufficiently large size are analogous to institutional uses such as hospices and nursing homes and should be so categorized. So long as a community adequately provides in its zoning scheme for group home uses, it should be free to continue the traditional classification of a single-family zone.

Respondents mistake the amount of single-family housing available for rent in Edmonds. Oxford House confuses the issue further by attempting to evaluate a local zoning scheme based solely upon specific economic element of its own particular program, in this case, utilization of a rental home. The disabled buy as well as rent homes and so long as residences are equally available to

the disabled, traditional zoning and use classification should be exempt from FHAA coverage.

Respondents and their Amicus Curiae attempt to create a distinction regarding use and occupancy regulations that has never been recognized by the federal courts. Local zoning schemes depend on the interplay of density requirements which limit the use of structures and occupancy limits on the number of persons which may occupy a given room or floor space within the structure. To attempt to separate legitimate police power tools contained within a common zoning scheme ignores the standard maxim of interpretation that a zoning ordinance should be construed broadly and as a whole in order to effectuate its purpose.

Respondents and their Amicus Curiae raise a variety of policy issues which are often conflicting. While the States' Attorneys General strongly urge the Court to intervene on behalf of various state programs, each state has the ability to restrict or preempt local zoning powers. Respondents raise the same argument with respect to an ambiguous Washington State statute which has yet to be the subject of scrutiny by the Washington courts. Given the violations asserted by the Respondents, all of which occurred before the date of enactment of the cited state statute, the issue before this Court is neither moot nor relevant to this Court's decision.

The FHAA grants rights to the disabled. The rights of citizenship must always be balanced against the responsibilities of citizenship. In this case, a citizen's responsibilities include complying with the reasonable exercises

of local police power including reasonable occupancy limits established by local zoning laws.

The traditional federal deference to local zoning ordinance should be continued. As Justice Marshall has stated, the federal courts should not become the zoning appeal boards of last resort. The plain meaning of the FHAA exemption includes the type of reasonable zoning regulations approved by the Court in its decisions and in place in communities throughout the country. While Respondents cannot agree between themselves whether the plain meaning of the statute controls, there is certainly not the "strong" nor "unambiguous" statement necessary to preempt local zoning laws and change 70 years of federal deference to local planning.

SECTION II.

A. Standard for Review of Exemption

The Respondents urge this Court to narrowly construe the exemption created by 42 U.S.C. § 3607(b)(1) citing the maxim of statutory construction that an exemption to a remedial statute should be narrowly construed. There is an older, stronger line of federal authority which will not permit preemption of a traditional area of local police power regulation absent a Congressional statement of intent in strong unambiguous language. There is a "presumption against the preemption of state police power regulations." *Cipollone v. Liggett Group, Inc.*, 120 L.Ed.2d 407, 424 (1992). This Court stated the rule in its decision in *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218 (1947), (companion case *Rice v. Board of Trade*, 331 U.S. 247 (1947):

The historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.

Rice, 331 U.S. at 230. This Court has required "strong" and "unambiguous language" in order to overcome this presumption when preemption is not expressly provided. *Rice*, 331 U.S. at 234.

Since its decision in *Village of Euclid v. Ambler*, this Court has classified local zoning as an exercise of state and local police power. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Euclid* established a strong tradition of deference to local zoning. As Justice Marshall stated in his dissent in *Village of Belle Terre v. Boraas*:

I am in full agreement with the majority that zoning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life. I therefore continue to adhere to the principal of *Euclid v. Ambler Realty Company*, 272 U.S. 365, 71 L. Ed. 303, 47 S. Ct. 114, 54 ALR 1016 (1926), that deference should be given to governmental judgments concerning proper land use allocation. That deference is a principal which has served this Court well and which is necessary for the continued development of effective zoning and land-use control mechanisms. Had the owners alone brought this suit alleging that the restrictive ordinance deprived them of their property or was an irrational legislative classification, I would agree that the ordinance would have to be sustained. Our role is

not and should not be to sit as a zoning board of appeals.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974).

The exemption created by 42 U.S.C. § 3607(b)(1) must be seen as opening the door to local action. *Rice v. Board of Trade*, 331 U.S. 247, 254, n6 (1942). ("Congress by granting the Board of Trade freedom to regulate within this narrow field has by that very act negated any inference that the federal government has preempted it by requirements of its own.") The question becomes whether the Act as a whole contains the type of "strong" and "unambiguous" language necessary for this Court to find a preemption of traditional zoning powers. As this Court has more recently stated:

If the statute contains an express pre-emption clause, the task of statutory construction must in the first instance focus on the plain wording of the clause, which necessarily contains the best evidence of Congress' pre-emptive intent.

CSX Transp., Inc. v. Easterwood, 113 S. Ct. 1732, 1737 (1993). Given the general preemptive nature of the statute (42 U.S.C. § 3615) and the exemption created, application of the plain meaning rule without the restrictive limitation urged by Respondents is appropriate.

In this context, Congress' use of the word "any" in the exemption is particularly instructive. "Nothing in this subchapter limits the applicability of any reasonable local . . . restriction regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Respondents gloss over the use of "any" and, in effect, request this Court to ignore it. Statutory

interpretation requires that every word in the statute be afforded its reasonable meaning. *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (quoting *Inhabitants of Montclair TP, County of Essex v. Ramsdell*, 107 U.S. 147, 152, (1883)). Given the presumption against a preemption of local and state police powers, the limited scope of preemption under the FHAA and the creation of an exemption to certain exercises of state and local police power, the use of the word "any" as a broad inclusive term is critical to the Court's analysis.

B. Comments of Individual Legislators

If the Court finds the terms of a statute unambiguous, judicial inquiry is complete, except in rare and exceptional circumstances. *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 187, n33, (1978), (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60, (1930)). The plain meaning rule coupled with the presumption against preemption of local police power regulation and both rules' emphasis on plain meaning requires close focus on the exemption. Petitioner's Brief on the Merits addressed the plain meaning of the FHAA exemption. Respondents themselves disagree as to whether the exemption has a plain meaning. Brief of United States at 17; Brief of Oxford House at 26. Respondent United States of America beginning at page 31 of its Brief relies extensively on comments of individual legislators. Applying a plain meaning rule in light of the unambiguous language utilized in the exemption, there is no need to go to the legislative history. Should the Court review the Committee Report, it is clear that its inquiry should end there:

We have eschewed reliance on the passing comments of one member [citation omitted] and casual statements from the floor of debates.

Garcia v. United States, 469 U.S. 70, 77 (1984), *reh'g denied*, 469 U.S. 1230 (1985).

The contemporaneous remarks of a sponsor of legislation are not controlling in analyzing legislative history. *Wineberger v. Rossi*, 465 U.S. 25, 35, n15 (1982) (citing *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 (1980); *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979)). This longstanding rule of construction is particularly applicable when construing a statute like the FHAA that partially preempts local regulation and then exempts certain state and local police power regulations.

C. Any Reasonable Occupancy Limitation

Zoning codes are broadly interpreted by the Washington State courts as a whole in order to effectuate their purpose and provide emphasis and meaning to each provision of such a code. *Wiggers v. Skagit County*, 596 P.2d 1345 (Wash. Ct. App. 1979); *State ex rel. Edward Meany Hotel, Inc. v. City of Seattle*, 402 P.2d 486 (Wash. 1965). As Petitioner notes in its Brief on the Merits, the definition of family works in concert with the Uniform Housing Code to regulate both the use of lots and buildings and the occupancy of individual rooms within the building. The census data provided indicates that the average family size in 1990 in the City of Edmonds was 2.4 residents, down from prior census data. *Jt. App.* at 110. The reasonableness, then, of regulating only consensual non-

family living arrangements is apparent. "[T]he circumstances surrounding the enactment of legislation are relevant to its construction." *Federal Deposit Ins. Corp. v. Isham*, 777 F. Supp. 828, 831 (D. Colo. 1991) (citing *Commissioner of Internal Revenue v. Engle*, 464 U.S. 206 (1984)); *see, also, Pittsburgh & Midway Coal Min. Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.) *cert. denied*, 498 U.S. 1012 (1990) (demographic information relevant to legislative action).

Respondents and their Amicus Curiae assert that consensual living arrangements of disabled persons in group homes are the functional equivalent of a family unit. Brief of Oxford House at 5; Brief of Amicus Curiae American Planning Association at 16. The descriptions of the program contained in Oxford House's Brief, as well as the description of senior adult group homes in the Brief of Amicus Curiae American Association of Retired Persons, show the institutional nature of these uses. Residents at Oxford House come, go and are expelled. Brief of Oxford House at 5-6. The program is self-perpetuating without the limitations inherent in a family unit and the stability provided by familial relationships. There are no bonds other than the common link provided by recovery from addiction and the need to share expenses.

As Oxford House's Brief notes, the stay of residents range from months to a few years, certainly not the stability inherent in a lifelong family relationship. Brief of Oxford House at 6. The average stay is 13 months. *Id.* at 6. Group homes for elderly residents frequently provide 24-hour care on a long term basis. Brief of Amicus Curiae American Association of Retired Persons at 17. At some point, these uses are indistinguishable from nursing

homes and small hospices or hospitals. The line between the hospital or nursing home in which patients are afforded full-time professional care and a group home in which a changing clientele of persons also receive 24-hour professional care is certainly not clear and in no way the equivalent of a family unit.

Respondents and Amicus Curiae American Planning Association rely in part upon a figure that only three percent of housing is available for the proposed group home use in the City of Edmonds.² Their use of the figure

² The difference in the figure used by the Petitioner and Respondents is based upon what housing universe the 258 properly zoned rental homes are compared. Respondents compare this number of rental homes to the total number of housing units in the City of Edmonds. The City compares the number to the total number of single family homes in the properly zoned portions of the City. Rather than compare 258 to the thousands of housing units in the City, the City believes it is more appropriate to judge whether a reasonable search by the Respondent could have resulted in a properly zoned location for the group home use. In fact, the percentage of rental units in properly zoned areas of the City and the vacancy rate cited in Petitioner's Brief on the Merits at pp. 27-28 are very similar to the percentage of rental homes and vacancy rates in the state as a whole. U. S. Department of Commerce Economic Statistics Administration Bureau of the Census, General Housing Characteristics - Washington 1990 *Census of Housing*, 1990CH-1-49, tbl. 28, at 78 (1990).

The figure is also misleading in that it presumes that the analysis of whether the City's zoning code is exempt depends upon the individual institutional characteristics of the treatment program of one nonprofit organization. For example, a private foundation could purchase a home and in turn rent it to the individuals in recovery and avoid any shortage of rental homes. The characteristics of the Oxford House program become the tail that wags the dog and leads to Respondent's argument that

underscores the institutional nature of the Oxford House use. Adopting this argument would require local communities to structure their entire zoning structure around the institutional needs of one nonprofit organization.

The Edmonds' ordinances provide for both group homes and other institutional uses in the various zones of the City. *Jt. App.* at 234, 239; Exhibit 1. The City's ordinance is not an exercise in exclusionary zoning but rather the reasonable classification of different occupancies and uses which is inherently a part of a zoning scheme. The reasonableness of classifying a use, such as a rooming house separate from the single family residential use, because of its potential for increased urbanized impacts was first recognized in *Euclid* and reaffirmed in *Belle Terre. Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). Given that the City's ordinance provides reasonable classifications based upon use, size and occupancy with a place in all zoning districts other than the single family zone for group homes for the disabled, this Court should continue its tradition of deferring to local zoning wisdom.

the City has unreasonably restricted their housing opportunities. Factually, rental housing opportunities are limited already by the size of structures available for rent, the rent charged in various localities, the vacancy rate at any particular time of year and a wide variety of other socio-economic circumstances that affect all renters, disabled or otherwise equally. These are not characteristics of the City's zoning code. What is important is that there are a large number (258) of rental homes available within properly zoned locations in the City.

It is asserted without supportive reasoning that residential treatment would be undermined by the City's zoning scheme. As has been noted, the City is a bedroom community with different residential zones. The mixed use multi-family residential zones of the City are comprised of homes, apartments, and small businesses identical to the site so strongly defended by Oxford House in Cherry Hill, New Jersey. *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992).

D. Wash. Rev. Code 35A.63.240 (1994)

In 1993, the Washington State Legislature amended the Washington Discrimination Act to incorporate the Fair Housing Act and FHAA. 1993 Wash. Laws, Ch. 69. During the same legislative session, the legislature also enacted the zoning provision referenced in the briefs of Oxford House and the United States. 1993 Wash. Laws, Ch. 478, § 21. No Washington appellate case has considered the impact of Wash. Rev. Code 35A.63.240 (1994) and no action is pending in any Washington court relating to interpretation of the provisions. Only one state agency has issued a regulation regarding the provision and that merely restates the statute. Wash. Admin. Code § 365-195-860 (Supp. 1993).

Wash. Rev. Code 35A.63.240 (1994) states:

No city may enact or maintain any ordinance, development regulation, zoning regulation or official control, policy, or administrative practice which treats a residential structure occupied by persons with handicaps differently than a similar residential structure occupied by a family or

other unrelated individuals. As used in this section, "handicaps" are as defined in the Fair Housing Amendments Act of 1988 (42 U.S.C. § 3602).

This paragraph is a clumsy paraphrase of comments of The Joint Committee Report. H.R. Rep. No. 711, 100th Cong., 2nd Sess. 23 (1988), reprinted in 1988 U.S.C.C.A.N. 2173. The reference in the state statute to residential structures confuses rather than clarifies the intent of the state legislature, leaving the intent and impact of the Washington statute far from certain.

Clarification by this Court of the obligations of the parties under the Fair Housing Act would benefit resolution of the state issue. The incorporation of state statutes parallel to the Fair Housing Act and FHAA and the contemporaneous enactment of Wash. Rev. Code 35A.63.240 (1994) clearly evidences an intent by the state of Washington to incorporate the Fair Housing Act and FHAA. The obligations of a municipality under state statute will necessarily parallel its federal obligations under the FHAA. Therefore, clarification of this issue would not only solve a national purpose by resolving a conflict between the circuits but also provide guidance to the state courts in interpreting and applying the state enactments.

Irrespective of any potential application or prospective impact of Wash. Rev. Code 35A.63.240, on the validity or interpretation of Edmonds' zoning ordinance, questions remain as to whether a violation of the FHAA occurred. This Court recognizes that even if one of several issues is moot, the remaining live issues satisfy the

case controversy requirement of Article III. *Powell v. McCormack*, 395 U.S. 486 (1969).

The Federal Government's complaint and Oxford House's counterclaim predate Washington's statutory amendment and both allege FHAA violations and request damages and penalties under the Act. So long as the potential for the assessment of damages and penalties against the City of Edmonds exists, all parties have a concrete interest in a final resolution of whether the Edmonds Community Development Code falls within the Fair Housing Act's exemption as a reasonable limitation on the maximum number of occupants. *See, e.g., Memphis Light, Gas and Water Division v. Craft*, 436 U.S. 1 (1978); *Ellis v. Brotherhood of Ry., Airline and S.S. Clerks, Freight Handlers, Exp. and Station Employees*, 466 U.S. 435 (1984). Consequently, the FHAA claims propounded by the Federal Government and Oxford House preclude a finding of mootness.

E. Rights and Responsibilities of the Disabled

The arguments of Respondents and many of their supporting Amicus Curiae assume that the rights of the disabled would be irretrievably impacted by subjecting them to the same responsibilities required of every citizen who rents or uses a home in the majority of communities throughout the land. Respondent Oxford House's Brief at 24 cites the Congressional findings contained at 42 U.S.C. § 6000(a)(9) (Supp. 1994). These findings were a part of the amendment of the Development Disabilities and Assistance and Bill of Rights Act contained in Pub. L. No.

98-527. As Respondent Oxford House notes, these findings were within Congressional knowledge at the time it extended Fair Housing Act rights to disabled persons in 1988. Petitioner City of Edmonds agrees that this statement of national policy is of interest as this Court analyzes this case. Those findings state:

[i]t is in the national interest to offer persons with development disabilities the opportunity, to the maximum extent feasible, to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens.

42 U.S.C. § 6000(a)(9) (Supp. 1994). This Congressional finding is critical in two respects. First, Congress finds that disabled persons should live in typical homes. A typical home in a single-family neighborhood is not comprised of 10 or 12 recovering drug addicts and alcoholics, each working and pooling his or her resources in order to maintain the group home as an institution and to transition back into the mainstream of society. Congress goes on to note its desire for mainstreaming into a typical "community." By distinguishing between a typical home and a community, Congress acknowledges that institutional uses can be located within different zones of a city. Such an exercise is a traditional function of local government – to classify different uses in a reasonable fashion and assign the uses an appropriate place within the community based upon the occupancy of various structures, the potential density of the zone, and the overall needs of the local community.

Secondly, and perhaps most importantly, Congress, as it began the process of providing for assistance to and

a bill of rights for persons with development disabilities, recognized that as persons with developmental disabilities exercised the opportunity to live in "typical homes and communities," they must do so in a way that will allow them to exercise both their full rights and accept their full "responsibilities as citizens."

Congress, therefore, recognized the basic fact of citizenship that rights come with responsibilities. Persons with disabilities shall be afforded full opportunity to live in the mainstream of society. This principle does not require that institutional uses, such as group homes or consensual living arrangements of renters voluntarily grouped together by reason of their disability and provided by their political charter with perpetual life, cannot be assigned by reasonable zoning classifications to appropriate residential zones of a city as a limitation on occupancy. Such classification must be reasonable, but it is the type of local zoning decision to which the federal courts have traditionally deferred. The language of the FHAA does not overcome the historic presumption in favor of the local exercise of zoning police powers and the plain meaning of the exemption clearly embraces such an exercise.

Police powers define everyday citizen obligations such as where to park a car, how fast that car may be driven and how property can be used. Such obligations are controlled by local laws enacted with knowledge of unique local conditions including topography, climate, the local economy and similar factors which help define the singular nature of a community. These factors are uniquely within the province of local officials. Every citizen should be held to obedience of reasonable exercises

of the police power and the federal courts should continue their deference to local decision making so long as the police power is reasonably exercised.

SECTION III. CONCLUSION

Petitioner respectfully requests that this Court apply the plain meaning of 42 U.S.C. § 3607(b)(1) and exempt the City of Edmonds' single family zoning structure from the FHAA.

Respectfully submitted,

W. SCOTT SNYDER

February 1995

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No. 94-23

U.S. Court, U.S.

FILED

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In The
Supreme Court of the United States

October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING
CODE COUNCIL, et al.,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

**BRIEF AMICUS CURIAE OF CITY OF FULTONDALE,
ALABAMA, IN SUPPORT OF PETITIONER**

PALMER W. NORRIS
City Attorney
Post Office Box 537
Gardendale, Alabama 35071
Tel: (205) 631-5646
Counsel of Record

FRED BLANTON, JR.
City Attorney, *pro tem*
Post Office Box 15
Fultondale, Alabama 35068
Tel: (205) 631-2853

*Attorneys for Amicus Curiae
City of Fultondale, Alabama*

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**BRIEF AMICUS CURIAE OF CITY OF FULTONDALE,
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INTEREST OF AMICUS CURIAE

The City of Fultondale, Alabama, as *amicus curiae*, is a political subdivision of the State of Alabama, and submits this brief in support of the City of Edmonds, petitioner. Counsel for *amicus curiae* are authorized law officers of the City, and consent to this submission is not necessary. Rules of the Supreme Court of the United States 37.5.

The City of Fultondale (Fultondale) is presently engaged in litigation concerning its Zoning Ordinance enacted September 8, 1986, which in the definition of

family adopted basically the one approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

One person or a group of two or more persons living together and inter-related by bonds of consanguinity, marriage, or legal adoption, occupying the whole or part of a dwelling as a separate housekeeping unit with a common and single set of culinary facilities. The persons thus constituting a family may also include two (2) additional guests who occupy rooms for which compensation may not be paid. Any group of persons not so related, but inhabiting a single housekeeping unit, shall be considered to constitute one family for each five persons, including domestic employees, contained in each group.

Fultondale further established a category acknowledging the existence of facilities operated by commercial or non-profit entities which provide care of persons with disabilities or the infirmities of old age. This category, based upon the realities of the situation, was labelled "domiciliary care facilities":

Homes for the aged, intermediate institutions, and related institutions, whose primary purpose is to furnish room, board, laundry, personal care, and other non-medical services, regardless of what it may be named or called, for not less than twenty-four (24) hours in any week, to individuals not related by blood or marriage to the owner and/or administrator. This kind of care implies sheltered protection and a supervised environment for persons, who because of age or disabilities, are incapable of living independently in their own house or a commercial board and room institution, yet who do not

require the medical and nursing services provided in a nursing home. In these facilities, there might be available temporary and incidentally the same type of limited medical attention as an individual would receive if he were living in his own home.

These domiciliary care facilities cannot be operated in the single family areas established of R-1 and R-2. However, they are permitted in the R-3 multiple family district, together with single family dwellings, and two-family dwellings, along with other uses.

In December of 1993, the ASSOCIATION FOR RETARDED CITIZENS OF ALABAMA, INC., of Jefferson County, placed three mentally retarded clients in a house located in an R-2 district. This private non-profit corporation (ARC) is engaged in the business of providing handicapped persons who are mentally retarded with housing facilities and services.

In his answers to interrogatories, the executive director of ARC stated that each of the clients had an IQ of less than 20, which is a profound level of mental retardation, or profound and severe. These clients are provided care by persons who come to work in shifts, and provide round the clock care including training in "personal hygiene, daily living, and social and recreation to the fullest ability of clients." There are eight (8) full and part time technicians, with around six (6) staff personnel who spend various hours in and about the premises. None of the clients is employed. Funds are supplied through Medicaid and state funding appropriations. Clients receive SSI, SSA, or VA benefits which are paid to ARC for room and board. Further funds are received by ARC through

United Way. ARC operates four 10 bed and ten 3 bed facilities. Taxpayer funds received are very substantial, according to answers of ARC.

The occupants in the *Edmonds* situation are apparently capable of independent living and voluntarily live together and operate the house. The occupants in the Fultondale house are not capable of independent living, according to the medical authorities. In *Tomb, Psychiatry* (4th Ed., Williams & Wilkins, Balto., Md., 1992), p. 169, the following appears:

"PROFOUND MENTAL RETARDATION (SM-111-R p. 33, 318.20) - IQ below 20. One percent of all retarded. They are totally dependent upon others for survival." (Emphasis supplied).

See also, Sue, *Understanding Abnormal Behavior* (3rd Ed., Houghton Mifflin Company, Boston, 1990), at pp. 479, et seq., to the same effect at p. 486:

"Profound (IQ 0 to 19) Only about 1 to 2 percent of people with mental retardation are *profoundly retarded*; these people are so intellectually deficient that constant and total care and supervision are necessary. * * * "

To protect the integrity of the R-2 district in which the ARC operation was located, Fultondale, joined by two citizens who had resided in their home in the district since 1976, filed an action in the Circuit Court of Jefferson County, Alabama, No. CV94-1508, on February 28, 1994, styled *Thrasher, et al. v. Housing Agency for Retarded Citizens, II, et al.*, for a declaratory judgment to determine the respective rights of the parties. The thrust of the position of the City was that in none of the zoning provisions set forth above was "there any language which does, or can

be interpreted to, place mentally retarded or other handicapped persons at any disadvantage whatsoever as compared to the remainder of the populace who wish to occupy premises for like reasons."

ARC answered by relying upon the Fair Housing Amendments Act, 42 U.S.C. §§3601-3619, especially a failure to make reasonable accommodations to permit the operation of the care center, citing 42 U.S.C. §3604(f)(3)(B).

ARC also filed its declaratory judgment counterclaim predicated upon the same section. A claim of intentional discrimination was asserted too. There was a demand to redefine "family".

Fultondale moved for a summary judgment on September 26, 1994, which was heard on October 14, 1994. An order entered on October 18, 1994, granted summary judgment to Fultondale based upon the "domiciliary care facility" use, as above, and which the Court held to be a valid and enforceable zoning ordinance in prohibiting such a use in an R-1 or R-2 area. Relief on the counterclaim was denied.

This summary judgment has been appealed by ARC to the Supreme Court of Alabama on November 21, 1994.

Fultondale, as with many cities, is a small community with limited resources and is faced, if the ruling of the Ninth Circuit is upheld, with the proliferation of placements by private entities, basically commercial though denominated "non-profit". Fultondale, as with other

cities, has been threatened with sanctions and large attorney fees if any placement be questioned. Fultondale finds its legally legislated zoning ordinance being destroyed!

SUMMARY OF ARGUMENT

The court below *held* that the zoning ordinance of Edmonds was invalid because there was no "reasonable accommodation" made to include a house with 10 occupants, and the exemption in 42 U.S.C. §3607(b)(1) was not applicable.

Fultondale, as *amicus curiae*, argues a court cannot force a political subdivision of a State to adopt any provision of the Fair Housing Amendments Act of 1988 and there has been no preemption of the local zoning ordinances. Thus, it could not use "reasonable accommodation" provision of the Act to hold a zoning ordinance invalid. The proper test of validity then would be that equal protection analysis in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). The court has also approved a class with superior rights without due process in reaching the approval.

Fultondale then argues that the "reasonable accommodation" provision does not apply to legality of zoning laws if a proper interpretation of the Act is made, with particular reference being made to the interpretation by the Department of Housing and Urban Development.

Finally, Fultondale argues that the Act is so broad in defining "handicapped persons" that a cap on unrelated

persons must be retained as a tool in effective zoning, which remains a local problem basically.

ARGUMENT

I.

THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT, U.S. CONSTITUTION, AS APPLIED IN *VILLAGE OF BELLE TERRE v. BORAAS*, 416 U.S. 1 (1974), IS CONTROLLING AND THE EDMONDS ZONING ORDINANCE IS VALID WITHOUT REGARD TO 42 U.S.C. §3607(b)(1) EXEMPTION

The case at bar, and the Fultondale one, involve legally enacted legislation by a State or one of its political subdivisions. The field of zoning in the States is not preempted, and indeed it most probably could not be constitutionally preempted. *New York v. United States, et al.*, Supreme Court, Nos. 91-543, 91-558, 90-563 (1992). Only a zoning ordinance which "purports to require or permit any action that would be a discriminatory housing practice under this subchapter shall to that extent be invalid." 42 U.S.C. §3615.

The Attorney General of the United States is authorized to bring an action to declare a zoning ordinance invalid. 42 U.S.C. §§3610(g)(2)(C) and 3614.

However, there can be no requirement that the States, or the political subdivisions, enact zoning legislation to carry into force the provisions of these FHA amendments. See *New York v. United States, supra*.

The United States Court of Appeals for the Ninth Circuit, it is submitted, erred constitutionally when it stated, at 18 F3rd, pp. 806-807 thusly:

" * * * the question is not whether Edmonds' ordinance could withstand a constitutional challenge brought by unrelated persons as in *Belle Terre*. It is whether Congress intended to apply the substantive standards of the FHAA to the ordinance. The legislative history and purposes of the FHAA demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped persons. This can require something more than the enactment of minimally constitutional and facially neutral zoning ordinances. Edmonds must satisfy the FHAA standards. * * * "

This conclusion places the sign of approval upon the creation by the Congress of a superior right in one with a disability which is not enjoyed by any other person, including the person who has purchased a house in a residential area zoned for single families relying upon that zoning, and which zoning has not been changed by the state mandated procedures, including the opportunity for a hearing.

The Ninth Circuit Court ignores the rights of homeowners, which was considered in *Belle Terre, supra*, and has destroyed these rights without any semblance of that due process guaranteed by the Fifth Amendment, United States Constitution, which should be followed by federal courts above all!

Thus, if the Ninth Circuit does not apply the statutory exemption, then, it is submitted, the question

devolves to the equal protection analysis in *Belle Terre, supra*, which should be followed, and not overruled.

II.

42 U.S.C. §3604(f)(3)(B), CONCERNING "A REFUSAL TO MAKE REASONABLE ACCOMMODATION IN RULES, POLICIES, PRACTICES AND SERVICES, ETC." IS IMPROPERLY INTERPRETED TO APPLY TO ZONING ORDINANCES.

The Fair Housing Amendments Act of 1988, 42 U.S.C. 3601-3619, is extremely broad legislation, but can be divided into two sections. The first treats discriminatory acts subject to administration by the Secretary of Housing and Urban Development. The second is about zoning laws. Thus, complaints of discrimination made to the Secretary which are determined to involve the legality of any State or local zoning or other land use law or ordinance shall be immediately referred to the Attorney General of the United States. See 42 U.S.C. §3610(g)(2)(C).

42 U.S.C. §3604, in which the reasonable accommodation language appears, is labelled to be primarily one about discrimination in sale or rental of housing, and a close reading sustains the correctness of the labelling. This conclusion is supported by a reading of the executive branch interpretation which appears at 24 CFR (rev. 1994), §100.204, p. 788, and revolves around discriminatory actions such as parking places and seeing-eye dogs.

A reading of the latest available *The State of Fair Housing, 1991*, the report of the Department of Housing

and Urban Development, reveals that HUD did use conciliation in a zoning variance complaint to obtain the variance, which is not a complaint involving the legality of the zoning law. Forty-five of these latter complaints were referred to the Department of Justice.

Nowhere does there appear any evidence that HUD or the Department of Justice believes it has the power to force the change of a zoning ordinance claimed to be discriminatory, so that a refusal to make a "reasonable accommodation" could be termed a discriminatory act.

This conclusion is on sound grounds, since in *Village of Belle Terre v. Boraas*, *supra*, this Court confirmed the idea in *NAACP v. Button*, 371 U.S. 415 (1962) of a right to vigorous advocacy and also the right of access to the courts, which must include the right to litigate to a decision and not to compromise, and this without penalty.

III.

THE CONSIDERATION OF THIS CASE MUST RECOGNIZE THE COUNTLESS FACTUAL SITUATIONS WHICH CONTINUE TO ARISE UNDER THE APPLICABLE LEGISLATION, ESPECIALLY THOSE CASES INVOLVING THE MENTALLY RETARDED

The question as posed before the Court posits application of the Fair Housing Amendments Act to persons protected by the Act.

All "handicapped persons" are not the same.

In *Edmonds* the handicapped are "recovering adult alcoholics and drug addicts". The house occupied is self-

supporting and democratically governed. In this *Fulton-dale* case, the clients in the residence are profoundly mentally retarded and must have constant and total care and supervision, and there could be at least ten (10) in a group home such as operated by ARC elsewhere.

This difference is discussed in *City of Cleburne, Texas v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442-443 (1985):

" * * * First, it is undeniable, and it is not argued otherwise here, that those who are mentally retarded have a reduced ability to cope with and function in the everyday world. Nor are they all cut from the same pattern: as the testimony in this record indicates, they range from those whose disability is not immediately evident to those who must be constantly cared for. They are thus different, immutably so, in relevant respects, and the States' interest in dealing with and providing for them is plainly a legitimate one. How this large and diversified group is to be treated under the law is a difficult and often a technical matter, very much a task for legislators guided by qualified professionals and not by the perhaps ill-formed opinions of the judiciary. Heightened scrutiny inevitably involves substantive judgments about legislative decisions, and we doubt that the predicate for such judicial oversight is present where the classification deals with mental retardation."

This sound advice from this Court was ignored completely in the legislation under consideration.

"Handicap" is defined in 42 U.S.C. §3602(h)(1) as follows:

" 'Handicap' means, with respect to a person -

- (1) a physical or mental impairment which substantially limits one or more of such person's major life activities. * * * "

24 CFR (rev. 1994), §100.201, p. 775, *et seq.*, in (a) (p. 776) states a *mental impairment* includes "(2) Any mental or psychological disorder, such as *mental retardation*, * * * " (Emphasis supplied.)

Further, (2) continues: "The term *physical or mental impairment* includes * * * *mental retardation*".

NO FURTHER DEFINITION OF MENTAL RETARDATION HAS BEEN LOCATED IN THIS STATUTE OR ANY OF THE REGULATIONS.

A cap on unrelated persons must be retained as a tool of effective zoning since outfits such as ARC are persistent in claiming the mentally retarded residing in a house even though totally dependent do, in fact, constitute a "family" and the house a "dwelling". 42 U.S.C. 3602(b). If indeed this be sanctioned then facilities such as nursing homes, domiciliary care facilities, etc., are covered by the legislation here involved, and local control of zoning is lost.

The disabled in the areas just mentioned are protected by the doctrine of *Cleburne, supra*.

CONCLUSION

Fultondale submits the cap on unrelated persons residing in a single family district should be retained either because of the exemption in 42 U.S.C. §3607(b)(1), or to follow the doctrine of *Village of Belle Terre, supra*.

Further, because of contentions that certain disabled persons living together in circumstances akin to a nursing home or total care commercial establishment are claiming to be a "family" the cap is necessary for reasons enunciated in *Cleburne, supra*.

Respectfully submitted,

PALMER W. NORRIS
City Attorney
Post Office Box 537
Gardendale, Alabama 35071
Tel: (205) 631-2853

FRED BLANTON, JR.
City Attorney, *pro tem*
Post Office Box 15
Fultondale, Alabama 35068
Tel: (205) 631-2853

Attorneys for Amicus Curiae
City of Fultondale, Alabama

8

Supreme Court, U.S.

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No. 94-23

In The
Supreme Court of the United States
October Term, 1994

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CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE
BUILDING CODE COUNCIL, ET AL.,

Respondents.

— ♦ —
On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit
— ♦ —

BRIEF OF TOWNSHIP OF UPPER ST. CLAIR AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

— ♦ —
Counsel to Amicus Curiae
ROBERT N. HACKETT*
MARK J. CHRISTMAN

ROBERT N. HACKETT & ASSOCIATES
1105 Boyce Road
Pittsburgh, PA 15241
(412) 941-3331

* *Counsel of Record*

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For The Ninth CircuitBRIEF OF TOWNSHIP OF UPPER ST. CLAIR AS
AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amicus curiae respectfully submits the within brief in support of the Petitioner. The Township of Upper St. Clair ("Township") is a political subdivision of the Commonwealth of Pennsylvania. Counsel to Amici curiae is the authorized law officer of the Township. Therefore, consent to the filing of this brief is not necessary. Supreme Court Rule 37.5.

The Township is concerned because the Township, like thousands of political subdivisions across the country, utilizes single family zoning as the basic building block for its zoning scheme. In drafting its definition of family, the Township believed that its definition was within the exemption to the Fair Housing Act set forth at 42 U.S.C. 3607(b)(1) which exempts certain regulations from scrutiny under the Fair Housing Act as a "reasonable local . . . restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." *Id.*

The decision by the Court of Appeals for the Eleventh Circuit in *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992) confirmed this understanding.

The concern of amicus curiae is a very realistic and immediate one. On August 31, 1993, Southwinds, Inc. ("Southwinds"), Residential Resources, Inc. ("Residential Resources"), and three mentally retarded persons filed a Complaint against Township in the United States District Court, Western District of Pennsylvania, at Civil Action No. 93-1443. Southwinds is a not-for-profit corporation which operates community residential programs for persons with mental retardation and is the residential service provider for the three mentally retarded persons. Residential Resources is a not-for-profit corporation which purchases properties to be used by persons with disabilities.

In their Complaint, plaintiffs alleged that the Township's Zoning Ordinance violates the Fair Housing Act, 42 U.S.C. § 3601, et seq. ("FHA"). On November 15, 1993,

the Township filed a Motion to Dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6). By Memorandum Opinion and Order dated May 18, 1994, Judge Maurice B. Cohill, Jr. of the United States District Court, Western District of Pennsylvania, denied the Township's Motion to Dismiss with respect to the claims under the FHA.

The case concerns the enforcement and propriety of a zoning ordinance enacted by the Township. (The Factual Statements in this Brief are from the Memorandum Opinion and Order.) For zoning purposes, the Township is divided into five residential zones, delineated R-1, R-2, R-3, R-4, and R-5. The three mentally retarded persons reside in an R-2 Zoning District. Township Code Section 130.9 defines those uses permitted in the R-2 Single-Family Residential District and limits permitted principal uses by right to Single-Family Dwellings. The Township Code defines single family dwelling in Section 130.3.80 as "A RESIDENTIAL DWELLING containing one (1) DWELLING UNIT occupied by one FAMILY and which is the only PRINCIPAL BUILDING on the LOT." On July 30, 1993, the Township issued a notice of violation to Residential Resources and Southwinds. The notice of violation charged Residential Resources and Southwinds with violating Township Code Section 130.3.84. The Township Zoning Code in Section 130.3.84 defines "FAMILY" as

one (1) or more persons related by blood, marriage or adoption; or a group of not more than two (2) persons who need not be related by blood, marriage or adoption, who are living together in a DWELLING UNIT and maintaining a common household and practicing on a permanent basis a joint economic, social and cultural life. If two (2) persons are living

together unrelated by blood, marriage or adoption, the basis for the relationship cannot be therapeutic or corrective or the profit motive. In addition, temporary gratuitous guests or persons, such as domestic servants, employed by the FAMILY and who report to the FAMILY for supervision and decision making may reside with the FAMILY. FAMILY shall not be construed to include a PERSONAL CARE HOME, a GROUP HOME, or a GROUP LIVING ARRANGEMENT. Nothing in this definition shall be construed to prohibit providing a home for children under the age of eighteen (18) years who are foster children or are living with the FAMILY with the permission of their parent or legal guardian.

Plaintiffs alleged that the Township Zoning Code violates the FHA in that the Code discriminates against the three mentally retarded persons by, inter alia, prohibiting them from living in residential zones R-1 and R-2 and failing to provide them with reasonable accommodations, even though the Zoning Code does not distinguish between disabled and nondisabled unrelated persons. In its Motion to Dismiss, the Township argued that the Township's definition of family is within the exemption set forth at 42 U.S.C. 3607(b)(1) for the reasonable occupancy limitations of local government entities. Pursuant to this section of the FHA, the Township urged that its Code is merely a "reasonable . . . restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." In support, the Township extensively relied on *Elliott v. City of Athens, Ga.*, 950 F.2d 975 (11th Cir. 1992), cert. denied, 113 S. Ct. 376 (1992), wherein the United

States Court of Appeals for the Eleventh Circuit considered a reasonable restriction exemption similar to the one proposed by the Township.

SUMMARY OF ARGUMENT

The plain language of the FHA exempts petitioner's occupancy restriction by exempting "any" reasonable maximum occupancy restriction. The language does not limit its terms to "absolute" maximum occupancy limitations. In an attempt to create ambiguity where there is none, respondents argue that petitioner's occupancy restriction is a "use" restriction and not an "occupancy" limitation. That argument ignores the fact that "occupancy" is a "use" and further ignores the fact that in ordinary usage restrictions limiting occupancy to single families are referred to as "occupancy" restrictions.

Nowhere in the FHA is there any mention or direct reference to local zoning ordinances. The wording of the FHA throughout consistently refers to the sale and rental or advertising and showing for sale and rental of dwelling houses, not to decisions of local zoning authorities. If Congress had intended that municipalities conform their zoning ordinances to make reasonable accommodations for handicapped persons, it could, should and would have done so.

Respondents rely heavily on their construction of a single sentence in a document issued by a single committee of a single house to change the plain meaning of the FHA. The sentence refers to limitations that apply to all occupants. A proper reading of the sentence in the House

Report refers only to limitations by governments that treat handicapped persons differently.

The Court of Appeals argues that exempting petitioner's occupancy restriction would undermine the purposes of the FHA by insulating single family residential zones from the sweep of FHA requirements. That analysis ignores the fact that the FHA expressly excludes from coverage the sale or rental of a single family house where the owner does not own more than three single family houses. Congress itself has chosen to insulate single family houses.

Finally, zoning is a municipal function. It may be the most essential function performed by local government. If Congress intends to pre-empt the historic powers of the States, it must make its intention to do so unmistakably clear in the language of the statute. Such an intention is far from clear in the language of the FHA.

ARGUMENT

1. **The Plain Language Of The Exemption Encompasses Petitioner's Occupancy Limitations.**
 - a. **The FHA exempts "any" "restrictions regarding the maximum number of occupants permitted to occupy a dwelling."**

Congress passed the FHA as Title VIII of the Civil Rights Act of 1968, Pub. L. 90-284, 82 Stat. 81. The original FHA applied to "discrimination in the sale or rental of housing" on account of "race, color, religion, sex or

national origin." 42 U.S.C. 3604. Congress extended protection to handicapped persons in the Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ (a) and (b)(1), 102 Stat. 1620-1622. The amendments make it unlawful to "discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap of . . . that buyer or renter." 42 U.S.C. 3604(f)(1)(A). Prohibited discrimination under the FHA includes "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. 3604(f)(3)(B). The FHA exempts certain regulations:

Nothing in this subchapter limits the applicability of *any* reasonable local, State, or Federal *restrictions* regarding the maximum number of occupants permitted to occupy a dwelling.

42 U.S.C. 3607(b)(1) (emphasis added).

The question is whether the amendments, which do not appear to be ambiguous as to the issues in this case, impose upon local zoning authorities any duty to alter zoning ordinances and regulations or to provide reasonable accommodations to a handicapped person living in a private single family dwelling. This is solely a matter of statutory interpretation.

- b. **The exemption expressly applies to "any" reasonable maximum occupancy restriction.**

The plain language of the exemption encompasses petitioner's occupancy restriction. The exemption by its

express terms exempts "any"¹ reasonable maximum occupancy restriction. The language does not limit its terms to "absolute" maximum occupancy limitations. As Justice Blackman wrote, "[w]hen we find the terms of a statute unambiguous, judicial inquiry should be complete except in rare and exceptional circumstances." *Freytag v. Commissioner*, 111 S. Ct. 2631 (1991).

- c. In ordinary usage, restrictions limiting occupancy to single families are referred to as "occupancy" restrictions.

The Court of Appeals argued that Edmonds Community Development Code ("ECDC") § 21.30.010 is not what is commonly referred to as an "occupancy" restriction, but rather is a "use" restriction, stating, "Edmonds reads the exemption broadly to include use restrictions, and Oxford House reads the exemption narrowly to cover only occupancy restrictions. The two differ." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 804 n. 3 (1994). That analysis ignores the fact that "occupancy"² is a "use." That analysis further

¹ The Random House Dictionary of the English Language, Second Edition, Unabridged (1987), defines "any" as "1. one, a, an, or some; one or more without specification or identification: *If you have any witnesses, produce them. Pick out any six you like.* 2. whatever or whichever it may be: *cheap at any price.* 3. in whatever quantity or number, great or small; some: *Do you have any butter?* 4. every; all: *Any schoolboy would know that. Read any books you find on the subject . . .*"

² The Random House Dictionary of the English Language, Second Edition, Unabridged (1987) defines "occupancy" to include "the use to which property is put."

ignores the fact that restrictions similar to ECDC § 21.30.010 are commonly referred to as "occupancy" restrictions.

The statute at issue in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), provided that "[t]he occupancy of any dwelling unit shall be limited to one, and only one, family . . ." *Moore v. City of East Cleveland*, 431 U.S. 494, 532 n. 1 (1977) (Stewart, J., dissenting) (emphasis added). The first sentence of the opinion states, "East Cleveland's housing ordinance, like many throughout the country, limits occupancy of a dwelling unit to members of a single family." *Moore v. City of East Cleveland*, 431 U.S. 494, 495-496 (1977) (emphasis added). The opinion then stated, "East Cleveland . . . has chosen to regulate the occupancy of its housing . . ." *Id.*, 431 U.S. at 498 (emphasis added).

Moreover, the concurring opinion of Justice Stevens, upon which respondents place heavy reliance, refers to the restriction as an "occupancy" limitation by stating, "attempts to limit occupancy to related persons have not been successful . . ." *Moore v. City of East Cleveland*, 431 U.S. 494, 516-517 (1977) (Stevens, J., dissenting).

Contrary to the argument of the Court of Appeals, in ordinary usage, ECDC § 21.30.010 is referred to as an "occupancy" restriction.

- d. By citing a few snippets of legislative history, the Court of Appeals has chosen to "look[] over a crowd and pick[] out [its] friends."

The Court of Appeals relies almost exclusively for its decision on one sentence from H.R. Rep. No. 711, 100th Cong. 2d Sess. (1988). The House Report states, "[r]easonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status."³ H.R. Rep. No. 711, 100th Cong. 2d Sess. (1988). The Court of Appeals then argues that "[e]xempting Edmonds' zoning provision would contravene the Report's directive that exempted restrictions apply to all⁴ occupants." *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 809, 805 (9th Cir. 1994).

³ A proper reading of this sentence in the House Report refers only to limitations by governments that treat the listed persons differently than other occupants. If the Court of Appeals' argument is followed to its logical conclusion, a government could not prohibit commercial activity in a single family residential district. To ensure financial self sufficiency, and to ensure the ability to afford to reside in a single family home, handicapped persons must engage in commercial activity. Restrictions prohibiting commercial activity in single family residential zones apply only to commercial occupants and therefore do not apply to "all occupants." Clearly, Congress did not intend this result.

⁴ The Court of Appeals focuses on the words "all occupants." If a Court is going to focus on a few words, it would seem to be more appropriate to focus on a few words in the statute itself, such as the words "any . . . restrictions."

Judge Harold Leventhal once said that citing legislative history is like "looking over a crowd and picking out your friends." Quoted in S. Breyer, *The 1991 Justice Lester W. Roth Lecture: On the Uses of Legislative History in Interpreting Statutes*, 65 S.Cal.L.Rev. 845, 845-46 (1992). Determining congressional intent by studying the legislative history and pronouncements of senators and congressmen during debate on particular legislation is at best an unsatisfactory method of statutory interpretation. See, e.g. *Conroy v. Aniskoff*, 113 S. Ct. 1562 (1993) (Scalia, J., concurring). Committee reports are unreliable evidence of what the voting members of Congress had in mind. *Blanchard v. Bergeron*, 489 U.S. 87 (1989) (Scalia, J., concurring).

That the Court of Appeals relied so heavily on its own construction of one sentence in a document issued by a single committee of a single house as the action of Congress displays an unrestrained use of legislative history. As Justice Scalia has stated,

It is neither compatible with our judicial responsibility of assuring reasoned, consistent, and effective application of the statutes of the United States, nor conducive to a genuine effectuation of congressional intent, to give legislative force to each snippet of analysis . . . in committee reports that are increasingly unreliable evidence of what the voting Members of Congress actually had in mind.

Blanchard v. Bergeron, 489 U.S. 87, 99 (1989) (Scalia, J., concurring).

The District Court, after reading the same legislative history, concluded that the "plain language of this

exemption" encompassed the petitioner's occupancy limitation and that "[n]othing in the legislative history of the FHA require[d] a different interpretation." Pet. App. 96-106. The Court of Appeals for the Eleventh Circuit in *Elliott v. City of Athens, Ga.*, 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992) similarly concluded that nothing in the legislative history indicated an intent of Congress to interfere seriously with reasonable local zoning.

The Court of Appeals has cited a few snippets of legislative history to change the plain meaning of the statute.

- e. **If Congress had intended that municipalities conform their zoning ordinances to make reasonable accommodations for handicapped persons, it could, should and would have done so.**

As Justice Scalia has stated,

[t]he meanings of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the *whole* Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of law into which the provision must be integrated . . .

Green v. Boch Laundry Machine Co., 109 S. Ct. 1981, 1994 (1989) (Scalia, J., concurring) (emphasis in original).

Nowhere in the FHA is there any mention or direct reference to local zoning ordinances. No express duties are imposed upon municipalities to conform their local zoning ordinances and regulations to comply with any provision of the FHA. The wording of the FHA throughout consistently refers to the sale and rental or advertising and showing for sale and rental of dwelling houses, not to decisions of local zoning authorities.

Many cities in this country have adopted similar use restrictions. *City of Edmonds v. Washington State Building Code Council, et al.*, 18 F.3d 802, 806 (9th Cir. 1994); *Elliott v. City of Athens*, 960 F.2d 975, 980 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992); *Moore v. East Cleveland*, 431 U.S. 494, 495-96 (1977).⁵

If Congress had intended that municipalities conform their zoning ordinances and regulations to make reasonable accommodations for handicapped persons, it could, should, and would have done so.

The Fair Housing Amendments Act of 1988, Pub. L. No. 100-430, §§ (a) and (b)(1), 102 Stat. 1620-1622 maintained all of the protections of the FHA and added a lengthy subsection (f) that was expressly applicable only to handicapped

⁵ In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the Supreme Court emphasized its reasons for protecting family living situations: "Our decisions establish that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Id.*, 431 U.S. at 503-504.

persons. In addition to the usual definitions of discrimination, the amendments included in subsection (f)(3) the following as constituting "discrimination":

(A) a refusal to permit, at the expense of the handicapped person, reasonable modifications of existing premises occupied or to be occupied by such [handicapped] person if such modifications may be necessary to afford such person full enjoyment of the premises except that, in the lease or rental, the landlord may where it is reasonable to do so condition permission for a modification on the renter agreeing to restore the interior of the premises to the condition that existed before the modification, reasonable wear and tear excepted;

(B) a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling.

42 U.S.C. 3604(f)(3)(A) & (B).

A proper reading of subsection (f)(3)(B) refers only to a refusal by landlords to make reasonable accommodations in rules, practices, et cetera.

In the sections immediately following the above-quoted subsection (B), the FHA expressly provides for state and "units of local general government" incorporating into their laws requirements for review and approval of the "design and construction of covered multi-family dwellings." 42 U.S.C. 3604(f)(5). Those sections further provide that the "Secretary [of Housing and Urban Development] shall encourage, but may not require, states and units of local government to include in their

existing procedures for the review and approval of newly constructed covered multifamily dwellings . . ." 42 U.S.C. 3604(f)(5)(C).

Certainly if Congress was capable of specifying the extent of the duties and obligations of municipalities in building requirements and, in fact, did so as provided in various subsections of 42 U.S.C. 3604(f), Congress could and would have specified any duty with regard to local zoning requirements.

A few noteworthy general observations should be reiterated. First, as relevant to any of the present issues, the wording of the FHA appears to be neither excessively complex, vague, ambiguous, or unclear, absent some attempt to expand meaning beyond the plain content of the language. Second, by the statute's own wording, the FHA intended to provide fair housing throughout the United States, 42 U.S.C. 3602, by prohibiting discrimination in the sale and rental of housing, 42 U.S.C. 3603(a) and 3604(f). Finally, the statute does not by its express words impose any obligation upon municipalities to alter or make exceptions to existing zoning ordinances or regulations.

f. The FHA expressly excludes from coverage the sale or rental of a single family house.

The Court of Appeals argues that exempting Edmonds' ordinance as an occupancy restriction would undermine the purposes of the FHA because "[a]pplying the exemption would insulate those single-family residential zones from the sweep of FHA[] requirements." *City of Edmonds v. Washington State Building Code Council*,

et al., 18 F.3d 802, 806 (9th Cir. 1994). That analysis ignores the fact that the FHA expressly excludes from coverage the sale or rental of a single family house where the owner does not own more than three single family houses. 42 U.S.C. 3603(b). That exclusion provides:

(b) Nothing in section 3604 of this title (other than subsection (c)) shall apply to

(1) any single family house sold or rented by an owner provided that such private individual owner does not own more than three such single family houses at any one time [with further provisos not relevant to the issues in this case].

42 U.S.C. 3603(b).

Landlords who do not own more than three single family houses are not required to make any accommodation, reasonable or otherwise. The statute by its wording exempts "any single family house" that otherwise qualifies for the exemption. Neither the house nor the owner is subject to FHA requirements. It appears illogical to contend that nevertheless Edmonds must alter its zoning ordinance to provide reasonable accommodations to handicapped persons living in private single family dwellings.

It makes no sense to argue that Edmonds' single family zoning would undermine the purposes of the FHA by insulating single family residential zones from the sweep of FHA requirements, where Congress itself has chosen to insulate single family houses from the sweep of FHA requirements.

2. If Congress Intends To Pre-Empt The Historic Powers Of The States, It Must Make Its Intention To Do So Unmistakably Clear In The Language Of The Statute.

Our Constitution establishes a system of dual sovereignty between the States and the Federal Government. This Court also has recognized this fundamental principle. In *Tafflin v. Levitt*, 493 U.S. 455, 458 (1990), the Court "beg[a]n with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." Over a hundred years ago, the Court described the constitutional scheme of dual sovereignty:

[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence, . . . "[W]ithout the States in union, there could be no such political body as the United States." Not only, therefore, can there be no loss of separate and independent autonomy to the States, through their union under the Constitution, but it may be not unreasonably said that the preservation of the States, and the maintenance of their governments, are as much within the design and care of the Constitution as the preservation of the Union and the maintenance of the National government. The Constitution in all its provisions, looks to an indestructible Union, composed of indestructible States.

Gregory v. Ashcroft, 111 S. Ct. 2395, 2399 (1991), quoting *Texas v. White*, 7 Wall. 700, 725, 10 L.Ed. 227 (1869) and *Lane County v. Oregon*, 7 Wall. 71, 76, 19 L.Ed. 101 (1869).

The Constitution created a Federal Government of limited powers. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. Amdt. 10. The States thus retain substantial sovereign authority under our constitutional system. *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991).

The "constitutionally mandated balance of power" between the States and the Federal Government was adopted by the Framers to ensure the protection of "our fundamental liberties." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 (1985), quoting *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting). Just as the separation and independence of the coordinate Branches of the Federal Government serves to prevent the accumulation of excessive power in any one Branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front.

James Madison explained the point:

In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate department. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and

separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

The Federalist No. 51, p. 323 (C. Rossiter ed. 1961) (J. Madison).

This case implicates a state constitutional provision through which the people of Washington authorize the cities of Washington to make and enforce zoning regulations. Article II, § 11 of the Washington Constitution provides "[a]ny county, city, town or township may make and enforce within its limits all such police, sanitary and other regulations as are not in conflict with general laws." See, *Nelson v. City of Seattle*, 64 Wash.2d 862, 395 P.2d 82 (1964). Zoning is a state and municipal function. See, *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 389 (1926); *Berman v. Parker*, 348 U.S. 26, 34-35 (1954).

The city has undisputed constitutional power to ordain single-family residential occupancy. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). This Court has expressed the importance of this municipal function:

[Z]oning is a complex and important function of the State. It may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

Congressional interference with this decision of the people of Washington authorizing the cities of Washington to make and enforce zoning regulations would upset the usual constitutional balance of federal and state powers. For this reason, "it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides" this balance. *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 243. This Court explained recently:

[I]f Congress intends to alter the "usual constitutional balance between the States and the Federal Government," it must make its intention to do so "unmistakably clear in the language of the statute." *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 242 [105 S. Ct. 3142, 3147, 87 L.Ed.2d 171] (1985); see also *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 99 [104 S. Ct. 900, 907, 79 L.Ed.2d 67] (1984). *Atascadero* was an Eleventh Amendment case, but a similar approach is applied in other contexts. Congress should make its intention "clear and manifest" if it intends to pre-empt the historic powers of the States, *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 [67 S. Ct. 1146, 1152, 91 L.Ed. 1447] (1947) . . . "In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 [92 S. Ct. 515, 523, 30 L.Ed.2d 488] (1971).

Gregory v. Ashcroft, 111 S. Ct. 2395, 2401 (1991), quoting *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989).

This plain statement rule is nothing more than an acknowledgement that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991).

In *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), the issue was whether Missouri State court judges are "appointees on the policy making level" and therefore exempted from the Age Discrimination in Employment Act's ("ACDEA") general prohibition of mandatory retirement. The dissent argued that Congress has expressly extended the coverage of the ACDEA to the States and their employees, and that the only dispute is over the precise details of the statute's application. *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2409 (White, J., dissenting). The majority rejected that argument and extended the plain statement approach. Similarly, even though certain provisions of the FHA may cover states and their political subdivisions, this is a very important issue. One-family or single-family detached residence districts are a well-recognized fact of use zoning regulations. As David M. Burch and Scott M. Ryals wrote:

The single-family zoning district has become the hallmark of modern American land use control. Justice Sutherland's opinion in *Village of Euclid v. Ambler Realty Co.*, [262 U.S. 365 (1926)], literally bristles with disdain for apartments and those who live in them. He likens apartment houses to "mere parasites" that feed upon the light, fresh air, and open spaces of the single-family district. From this exalted position, the single-family zone and its protection have tended to dominate local land use decision-making.

D. Burch and S. Ryals, *Land Use Controls: Requiem for Zoning and Other Musings on the Year 1982*, 15 Urban Law. 879, 880 (1983).

The right to establish such highly restricted districts has been well settled for years. *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The definition of "family" is essential to zoning district regulation. Many local legislatures have redefined the term "family" to exclude groups of unrelated persons from occupying dwellings in districts restricted to single-family use. R. Anderson, *American Law of Zoning*, § 9.30 (1986).

If Congress intends to pre-empt the historic powers of the States, it must make its intention to do so unmistakably clear in the language of the statute. That intention certainly is not clear in the language of the FHA.

CONCLUSION

For the foregoing reasons, Amicus Curiae submits that the Order of the Court of Appeals for the Ninth Circuit should be reversed and the judgment of the District Court affirmed.

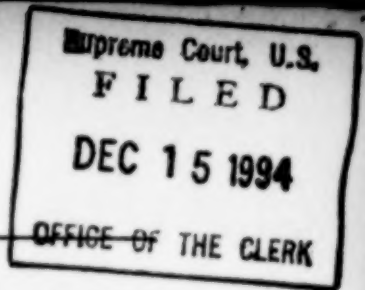
Respectfully submitted,

ROBERT N. HACKETT
MARK J. CHRISTMAN

ROBERT N. HACKETT & ASSOCIATES
1105 Boyce Road
Pittsburgh, PA 15241
(412) 941-3331

*Counsel to Amicus Curiae,
Township of Upper St. Clair*

No. 94-23



IN THE
Supreme Court of the United States
October Term, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,
et al.,

Respondents.

Writ of Certiorari to the United States
Court of Appeals for Ninth Circuit

BRIEF AMICUS CURIAE OF CITY OF MOUNTLAKE TERRACE
WASHINGTON IN SUPPORT OF PETITIONER

Gregory G. Schrag
City Attorney
21907 64th Avenue W. Suite 370
Mountlake Terrace, WA 98043
(206) 776-7386
Counsel of Record, Attorney for
Amicus Curiae City of Mountlake
Terrace, Washington

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BRIEF AMICUS CURIAE OF CITY OF MOUNTLAKE TERRACE
WASHINGTON IN SUPPORT OF PETITIONER

IDENTITY AND INTEREST OF AMICUS CURIAE

The City of Mountlake Terrace,
Washington, as amicus curiae, is a political
subdivision of the State of Washington, and

submits this brief in support of the City of Edmonds, petitioner. Counsel for amicus curiae is an authorized law officer of the City and consent to this submission is not necessary, however counsel has received consent from petitioner. Rules of the Supreme Court of the United States 37.5.

The City of Mountlake Terrace border is contiguous to its neighbor the City of Edmonds, and the City of Mountlake Terrace has adopted substantially the same definition of family as the City of Edmonds. Mountlake Terrace City Code, Section 10-3.2(39) defines family as:

One or more persons related by blood, marriage, adoption or a group of not more than six (6) persons not related by blood or marriage living together in a single housekeeping unit in a dwelling unit.

In March 1994, the Oxford House, an unincorporated association, established a group home within the city limits of Mountlake Terrace consisting of residents unrelated by blood, marriage or adoption,

exceeding the maximum number of unrelated occupants permitted to occupy a dwelling located in an area zoned for single family within the City of Mountlake Terrace. As appears to be the case in the Edmonds situation, the Mountlake Terrace occupants are capable of independent living and voluntarily live together and operate the house located within the area zoned single family residence. Because of the action initiated by the City of Edmonds and the Ninth Circuit Court of Appeals decision, there has been no enforcement action commenced against the Oxford House-Mountlake Terrace. The Mountlake Terrace matter has been held in abeyance pending final resolution by this court.

The City of Mountlake Terrace is a small community consisting of approximately 20,000 residents, has limited resources, and finds itself now faced with potentially expensive

and time consuming litigation regarding what constitutes "reasonable accommodations." If the Ninth Circuit is upheld in its decision, the City of Mountlake Terrace, as well as many other cities will be placed in the position of either redrafting the ordinances to provide for a maximum number of occupants on the basis of habitable floor area in a dwelling or establishing a fixed maximum number of occupants without regard to whether they are related. The former would not preserve the ability of large families to live together and the latter is likely to be subject to challenge as a violation of the protections afforded by the Due Process Clause of the Fourteenth Amendment.

SUMMARY OF ARGUMENT

The plain language of the FHAA provides that certain regulations are exempt from FHAA's provisions. FHAA's provisions do not apply to "reasonable local, state or federal

restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. Section 3607(b)(1). Edmonds' zoning ordinance, while recognizing the Fourteenth Amendment protection that is extended to family, clearly provides for a reasonable restriction regarding the maximum number of occupants permitted to occupy a dwelling. Therefore Edmonds' zoning ordinance is exempt from the FHAA's provision.

ARGUMENT

I.

EDMONDS' SINGLE FAMILY ZONING ORDINANCE PROVIDES A REASONABLE LOCAL RESTRICTION ON THE MAXIMUM NUMBER OF OCCUPANTS PERMITTED TO OCCUPY A DWELLING AND CONSEQUENTLY IS EXEMPT, BY THE ACT'S OWN CLEAR LANGUAGE, FROM THE FHAA PROVISIONS.

Not all regulations are subject to the provisions of the Fair Housing Act Amendments

(FHAA). Reasonable local restrictions on the maximum number of occupants permitted to occupy a dwelling are expressly exempt from the FHAA's purview. 42 U.S.C. section 3607(b)(1). Like the City of Mountlake Terrace and numerous other communities throughout the country, Edmonds permits a maximum number of unrelated persons to live in a single family dwelling unit within its city limits. ECDC 21.30.010.

42 U.S.C. 3607(b)(1) specifically and in plain language exempts from its provisions reasonable local, state or federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. The City of Edmonds' ordinance falls within this statutory exemption under Title 42 U.S.C. 3607(b)(1) since it permits five or fewer unrelated persons in the City's single family residential areas and consequently the ordinance restricts the maximum number of

occupants as it pertains to unrelated individuals who may occupy a single family dwelling. Therefore, if the ordinance is reasonable, it is exempt from the FHAA. The fact that the ordinance makes a distinction based on whether the occupants are related does not diminish or negate the fact that there is a clear restriction on the maximum number of unrelated occupants. The Edmonds ordinance treats all unrelated individuals who chose to live together in a single family residential area equally, disabled or non-disabled, black or white, male or female, rich or poor.

The distinction between related and non-related inhabitants in the Edmonds ordinance is simply an acknowledgement that the Due Process Clause of the Fourteenth Amendment extends its protection to the family. The City of Edmonds' definition of family follows the form approved by this court in Village of

Belle Terre v. Boraas, 416 U.S. 1 (1974).

The ordinance adopted by Edmonds merely recognizes the ruling as set forth in Moore v. City of East Cleveland, 431 U.S. 494 (1977) in extending the benefits and protections of its single family zone to the extended family.

The City of Edmonds has a legitimate interest in preserving and maintaining the character of its single family areas. The ordinance is a reasonable restriction on the maximum number of occupants who may occupy a dwelling. As this court has already recognized, the City may exercise its police powers to "lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." Village of Belle Terre v. Boraas, 416 U.S. 1 at 9. This legitimate interest in the tranquility of single family residential areas has also been

recognized in City of Memphis v. Greene, 451 U.S. 100 (1981). Because of Edmonds' recognized legitimate interest in establishing, preserving and maintaining the character of its single family neighborhoods, the ordinance is reasonable and since it is a restriction on a maximum number of people who may occupy the dwelling, is exempt from the FHAA.

CONCLUSION

The City of Mountlake Terrace submits that the Edmonds zoning ordinance is exempt from the FHAA's provisions as a reasonable local restriction regarding the maximum number of occupants permitted to occupy a dwelling and that the Ninth Circuit Court of Appeals should be reversed.

DATED: December 15, 1994.

Respectfully submitted,

Gregory G. Schrag
Counsel of Record
21907 64th Avenue W.,
Suite 370
Mountlake Terrace,
Washington 98043
Telephone (206) 776-7386
Attorneys for Amicus
Curiae, Mountlake Terrace
Washington

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Respondents.

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

**BRIEF AMICUS CURIAE OF PACIFIC
LEGAL FOUNDATION IN SUPPORT OF
PETITIONER, CITY OF EDMONDS**

RONALD A. ZUMBRUN

***ANTHONY T. CASO**

***Counsel of Record**

ALAN W. FOUTZ

GREGORY W. MCCracken

Of Counsel

Pacific Legal Foundation

2151 River Plaza Drive, Suite 305

Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amicus Curiae,

Pacific Legal Foundation

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**BRIEF AMICUS CURIAE OF
PACIFIC LEGAL FOUNDATION IN SUPPORT OF
PETITIONER, CITY OF EDMONDS**

INTERESTS OF AMICUS CURIAE

Pursuant to Supreme Court Rule No. 36, Pacific Legal Foundation respectfully submits this brief amicus curiae in support of petitioner, City of Edmonds. Consent to the filing of this brief has been granted by counsel for all parties. The

letters of consent have been lodged with the clerk of this Court.

Pacific Legal Foundation is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has over 20,000 contributors and supporters located throughout the country and maintains its principal office in Sacramento, California. The Foundation's policy is set by a Board of Trustees composed of concerned citizens, many of whom are attorneys. PLF's Board evaluates the merits of any contemplated legal action and authorizes such action only where the Foundation's position has broad support within the general community.

Amicus seeks here to augment the arguments that will be put forth by the parties to this action. It is believed that PLF's public policy perspective and litigation experience in support of individual rights and government accountability will provide an additional viewpoint with respect to the constitutional and statutory issues presented. PLF has participated in numerous cases involving local zoning and land use regulations: *Dolan v. City of Tigard*, 512 U.S. ___, 129 L. Ed. 2d 304 (1994), *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987); cases that address the possible discriminatory effect of local ordinances, *City of Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989); and cases that address the balance between federal and local regulatory power, *Chisom v. Roemer*, 501 U.S. ___, 115 L. Ed. 2d 348 (1991).

PLF is interested in this case because of the sensitive issues of federal intrusion into the realm of zoning and land use regulations, an area that since the establishment of our federal system has been the exclusive domain of local governmental authority, that are present in this case. PLF

seeks to provide this Court with public policy perspectives on the balancing of local and federal interests when a particular zoning scheme might run afoul of the admittedly federal interest in suppressing all forms of discrimination against the handicapped.

OPINION BELOW

The opinion of the Ninth Circuit Court of Appeals is reported at *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802 (9th Cir. 1994). The Ninth Circuit held that local zoning ordinances that limit only the number of unrelated persons who may live together are subject to the mandates of the Fair Housing Act, 42 U.S.C. § 3601, *et seq.* (the Act), and the Fair Housing Amendments Act of 1988 (FHAA), which extended the Act's antidiscrimination provisions to the handicapped. 42 U.S.C. §§ 3604(f)(2), 3604(f)(3)(B), 3607(b)(1). *Edmonds*, 18 F.3d at 806-07.

This conclusion was arrived at notwithstanding the unambiguous exemption found at 42 U.S.C. § 3607(b)(1), which states that the FHAA will not "limit[] the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

INTRODUCTION

Oxford House, Inc., sponsors halfway houses around the country for recovering alcoholics and drug addicts. Oxford House has determined that each recovery facility must have six or more residents "to ensure financial

self-sufficiency, to provide a supportive atmosphere for successful recovery, and to comply with federal requirements for the receipt of state start-up loans." *Edmonds*, 18 F.3d at 803. The home in which the Edmonds Oxford House seeks to establish a recovery facility is a leased residence in which 10 to 12 adult men will be housed at any given time. The house is situated in an area that is zoned single-family residential. *Id.*

Edmonds issued criminal citations to the owner of the Oxford House for violating provisions of the Edmonds Community Development Code (ECDC) which provide that property zoned single-family residential may only be used for single-family dwelling units. ECDC § 16.20.010(A)(1). A single-family dwelling unit means a detached building used by one family, limited to one per lot. ECDC § 21.90.080. Under ECDC § 21.30.010, a family "means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage." Thus, group homes of more than five unrelated recovering alcoholics and drug addicts are effectively excluded from single-family residential zones in Edmonds, but not from multifamily residential zones.¹

Under the FHAA, it is unlawful to discriminate against any person because of a handicap. 42 U.S.C. § 3604(f)(2). The residents of the Oxford House are handicapped persons under the FHAA. 42 U.S.C. § 3602(h) (stating that a person participating in a supervised drug rehabilitation program,

¹ Portions of the ECDC requiring a conditional use permit for group homes for the disabled in multifamily residential zones have been repealed, thereby enabling group homes to operate in homes situated in multifamily residential zones as a matter of right. Petition for writ of certiorari at 16-17.

coupled with nonuse, meets the definition of handicapped). Where FHAA's provisions apply, a finding of discrimination may be based on "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B).

However, under 42 U.S.C. § 3607(b)(1), FHAA's provisions do not apply to "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." The court below has recognized that the City of Edmonds has not acted with any animus toward or intent to discriminate against the occupants of Oxford House because of their handicap. *Edmonds*, 18 F.3d at 803.

Oxford House requested the City of Edmonds to make reasonable accommodations under Section 3604(f)(3)(B) by letting it continue operations in the single-family residential zone. The City of Edmonds declined and filed a declaratory relief action seeking a ruling that its single-family residential zoning provision was exempt from FHAA's provisions under Section 3607(b)(1).

The District Court held that the exemption applied, relying on the analysis provided in *Elliott v. Athens*, 960 F.2d 975 (11th Cir.), *cert. denied*, ___ U.S. ___, 121 L. Ed. 2d 287 (1992), an Eleventh Circuit decision that likewise involved an attempt to establish a group recovery home in a dwelling zoned single-family residential. However, the Ninth Circuit disagreed with the *Elliott* court's analysis and held that the exemption did not apply and that the zoning ordinance was in violation of the FHAA. The Ninth Circuit's decision therefore creates a direct and irreconcilable split among circuits with regard to how

FHAA's exemptions are to be interpreted. This Court is now asked to resolve the inconsistency in how zoning ordinances limiting the number of unrelated persons living together are to apply to FHAA.

SUMMARY OF ARGUMENT

The plain language of the Edmonds' ordinance and the plain language of FHAA's exemption provisions are sufficient to establish that the City of Edmonds need not submit to the lengthy and expensive process of determining whether "reasonable accommodation" has or must be made to the Oxford House under the FHAA. *See Elliott v. Athens*, 960 F.2d at 979-81.

The Ninth Circuit's decision significantly undermines local government's ability to enact land use regulations and represents an unwarranted and dangerous incursion of federal power into local governmental affairs. To the extent that land use and occupancy restrictions may be imposed by governmentally wielded police power, they ought to originate and be interpreted at the local level. This Court has long recognized that land use regulations and property law have traditionally been the province of state authority. *See Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981); *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975).

This case also gives rise to the fundamental question of whether applying the FHAA to local governments in the manner presented in this case constitutes a valid exercise of the enumerated powers which the United States Constitution extends to Congress. Amicus will show that the framers did not contemplate that Congress would wield such intrusive powers and that the constitutional grant of authority upon

which Congress relied in adopting the FHAA does not support application of the FHAA in a manner that subjects the ordinance at issue in this case to federal manipulation

ARGUMENT

I

EDMONDS' ORDINANCE LIMITING THE NUMBER OF UNRELATED PEOPLE WHO MAY LIVE IN SINGLE-FAMILY RESIDENTIAL DWELLINGS IS EXEMPT FROM FHAA'S REQUIREMENTS

A. The City of Edmonds' Single-Family Zoning Ordinance Is Exempt from the FHAA by the FHAA's Clear Language

1. The Ordinance Restricts the Maximum Number of Individuals Permitted To Occupy a Dwelling

The FHAA exempts some regulations from its purview, including reasonable local restrictions on the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607(b)(1). The City of Edmonds permits five or fewer unrelated persons or two or more persons related as specified by ordinance to live in a single-family dwelling within its boundaries. ECDC § 21.30.010. The structure of the city's zoning code is common to the vast majority of cities in the State of Washington and many communities throughout the country. *City of Edmonds v. Washington State Building Code Council*, 18 F.3d 802. Although the Edmonds' ordinance makes a distinction between inhabitants

of a single-family dwelling who constitute a family and inhabitants who do not fit the ECDC definition of family, the ordinance nevertheless restricts the maximum number of occupants who may occupy a dwelling and is therefore exempt from the FHAA according to the FHAA's plain language.

The distinction between related occupants and unrelated occupants exists only to recognize the protection that the Due Process Clause of the Fourteenth Amendment extends to the family. This distinction, as defined by Edmonds' definition of "family," follows the form which this Court approved in *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8-9 (1974) (holding that a zoning ordinance limiting single-family dwellings to a maximum of two unrelated persons without limiting the number of related persons was rationally related to legitimate interests relating to density, traffic, and quiet, open spaces for families).

Although *Belle Terre* did not address the specific question of whether the ordinance at issue constituted a maximum occupancy restriction, it did uphold the underlying constitutionality of the ordinance. The Court recognized that the ordinance at issue, much like the Edmonds' ordinance, is not aimed at transients, involves no procedural disparity, and involves no "fundamental" right. *Belle Terre*, 416 U.S. at 7. Coupling these factors with the Court's determination that "[a] quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs" (*id.* at 9), the Court concluded that these are permissible goals and that "[i]t is ample to lay our zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.*

The ordinance also expressly avoids limiting the number of members of a family in light of this Court's teaching in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977). *Moore* gave rich expression to the sanctity that is to be accorded the family and stated that the Constitution protects the family because of the family's deep historical and traditional roots and its role in passing down our most cherished moral and cultural values. *Id.* at 503-04. Based upon this recognition of the family's importance, *Moore* invalidated an ordinance which limited occupancy to members of a single family, but that defined family in a manner that prevented a grandmother from living with her grandson.

The Ninth Circuit's reasoning pays no attention whatsoever to this extremely important policy consideration and mentions the *Moore* decision primarily as an example of a use restriction similar to the one adopted in Edmonds. *Edmonds*, 18 F.3d at 806. The Ninth Circuit then states that "[a]pplying the [FHAA] exemption would insulate these single-family residential zones from the sweep of FHAA requirements." Amicus fails to discern the horrible consequences that would flow from exempting otherwise constitutional zoning regulations from the reach of FHAA simply because the regulation recognizes that a family, even an extended family, is immeasurably different from a group of unrelated individuals living together in circumstances that often pose a significant threat to the solitude and protection that government is legitimately charged with providing for families.

The Eleventh Circuit in *Elliott*, examined both *Moore* and *Belle Terre* and concluded that "it is apparent that Supreme Court precedent sanctions zoning limitations based upon the number of unrelated persons living together" (*Elliott*, 960 F.2d at 980) and that "*Moore* and *Belle Terre*,

read together, indicate that a reasonable method of controlling density is to place occupancy limitations on unrelated persons but not on related persons." *Id.* at 981. The *Elliott* court then correctly concluded that the zoning restriction there at issue, which likewise limited only the number of unrelated persons who could occupy a single-family dwelling, was a maximum occupancy limitation. *Id.*

The Ninth Circuit, however, adopts a construction of the FHAA exemption that would categorically exclude any zoning restriction which differentiates between the number of related versus unrelated occupants. *Edmonds*, 18 F.3d at 805. In reaching this construction, the Ninth Circuit ignored the plain language of Section 3607(b)(1) and elevated language from a single committee report to the status of the declaration of congressional intent. The Committee Report relied upon below states that under the exemption found in Section 3607(b)(1), "[r]easonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H.R. REP. No. 711, 100th Cong., 2d Sess. (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2192 (committee report). The reasoning that since the zoning ordinance at issue did not apply to "all occupants" but only to unrelated persons, it did not fit the criteria for exemption ignores the plain language of the statute, the purpose of FHAA and the context of the phrase "all occupants."

Section 3607(b)(1) applies to "any reasonable local, State, or Federal restriction[] regarding the maximum number of occupants permitted to occupy a dwelling." This language is admittedly broad, with no indication that certain methods of determining maximum occupancy limitations are exempt while others are not, as long as the particular method

is reasonable. Unfortunately, the Ninth Circuit was unable to "discern from the plain language of the statute whether Congress intended to exempt Edmonds' zoning ordinance." *Edmonds*, 18 F.3d at 804. Noting that Section 3607(b)(1) could be interpreted either as only including ordinances that restrict the number of all occupants or as including ordinances that limit just the number of unrelated occupants, the Ninth Circuit found that "neither follows directly from the plain language." *Id.*

Amicus contends that the plain language in fact supports the construction propounded by petitioner. The ordinance is reasonable (*see* discussion, *infra*), and it limits the maximum number of people who may live in a single-family residence. The fact that this limitation is something less than a universal limit on all categories of occupants should not alter the fundamental nature of the limitation, as long as the limitation is not drawn along unconstitutional lines. Indeed, the Ninth Circuit has taken what must be considered to be at least some form of maximum occupancy limitation and *limited its applicability* under the FHAA. This result is what Section 3607(b)(1) was expressly designed to prevent. Because the ordinance meets the plain language of the statute, reference to congressional intent is unnecessary.

If, however, the Court deems it appropriate to look into Congress' intent behind FHAA and its exemption, this Court should recognize that the Committee Report relied upon below represents but a thin slice of evidence of Congress' intent on this matter. Moreover, portions of the Committee Report that evince an intent to exclude ordinances such as the one here at issue were ignored. A careful reading of the Committee Report indicates an unequivocal intent to prohibit only those laws and regulations "which discriminate against individuals with handicaps," or that constitute "application of special requirements through land use regulations," or the

"enforcement of otherwise neutral rules and regulations ... in a manner which discriminates against people with disabilities." Committee Report at 2185. Thus, excluding the Edmonds' zoning ordinance from FHAA oversight works no violation of FHAA's purposes since it does not discriminate, either directly or indirectly, against the handicapped or any other protected group.

To the limited extent that the Committee Report can be looked to as evidence of congressional intent, it should also be recognized that the inclusion of "familial status" in the list of grounds for discrimination which the FHAA was designed to prevent in no way jeopardizes the Edmonds' ordinance. "Familial status" refers specifically to "one or more individuals (who have not attained the age of 18 years) being domiciled with (1) a parent or another person having legal custody of such individual or individuals; or (2) the designee of such parent or persons having such custody." 42 U.S.C. § 3602(k). No such discrimination is implicated by Edmonds' zoning ordinance.

Also, the committee mentions, by way of example, that "[a] number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit." *Id.* (emphasis added). If Congress intended such a method of limiting occupancy to be the sole method contemplated by the FHAA exemption, surely Congress would have done more than merely mention it as a method employed by a number of jurisdictions.

The court in *Elliott* expressly stated:

We do not believe that Congress intended that the maximum occupancy limitation exemption would apply *only* to a limitation on the maximum number of persons per square foot of dwelling

space. A careful reading of the legislative history demonstrates that Congress was merely giving examples of the type of restrictions on occupancy that would be reasonable.

Elliott, 960 F.2d at 980 (emphasis in original).

Thus, the Edmonds' ordinance's constitutionally appropriate accommodation of familial interests should not render its remaining language any less of a restriction on the maximum occupancy of a single-family dwelling.

2. The Ordinance Is Reasonable

Under the FHAA, "reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling" are exempt from FHAA's purview. 42 U.S.C. § 3607(b)(1). The Edmonds' ordinance is a reasonable restriction on the maximum number of occupants who may occupy a dwelling. The City of Edmonds has an unquestionably legitimate interest in the tranquility of its single-family residential areas, *see City of Memphis v. Greene*, 451 U.S. 100, 127, *reh'g denied*, 452 U.S. 955 (1981), and it may exercise its police powers "to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people." *Id.* at 127 n.43 (quoting *Village of Belle Terre v. Boraas*, 416 U.S. at 9). The ordinance controls population density, traffic, and noise in single-family residential areas while preserving the residential character of such areas. The ordinance does *not* prohibit group homes, but merely regulates the number of people who may live in such a home.

In seeking to preserve the tranquility of single-family residential areas and the sense of community and common

values and interests that such areas provide its residents, it is certainly reasonable to conclude that homes occupied by more than five people who are not related--who are not a "family"--may pose a greater threat to the area's tranquility than homes occupied by families consisting of the same number of people. The factor of whether the inhabitants of a single-family dwelling constitute a family bears directly on the outcome which the local government is legitimately seeking by adopting a separate zoning designation for single-family residences.

The City of St. Louis, in a case currently pending before the Eighth Circuit, has examined the impact the Oxford Houses have on single-family neighborhoods and has found that parking difficulties are aggravated, members of Oxford House and their visitors are coming and going at all hours of the day and night, and Oxford House residents are highly transient. Brief of Appellant, *Oxford House v. City of St. Louis*, No. 94-160 EMSL (8th Cir.), at 23-24. The record in that case also indicates that of the 26 people who lived at one Oxford House between May of 1992 and January 26, 1993, 11 relapsed or were suspected of relapsing into drug or alcohol abuse. *Id.* at 24. Oxford House admitted that alcoholics and drug addicts are extremely dangerous when using, all Oxford House members have histories of crime, and that Oxford House experts may not be able to detect a relapse as soon as it happens. *Id.*

As applied in this case, the ordinance admittedly precludes unrelated groups of more than five recovering alcoholics and drug abusers from living in a single-family residential dwelling. However, this preclusion stems from the fact that those recovering are not related to one another, not because they are handicapped. The reasonableness of such a limitation is supported by the fact that the average size of a family in Edmonds is 2.88 persons. 1990 Census

of Population and Housing, Summary Population and Housing Characteristics - Washington, Table 5. Oxford House proposes to house 10 to 12 adults in housing stock that the City of Edmonds generally uses to house approximately three people per dwelling.

The Edmonds' ordinance is therefore a reasonable and nondiscriminatory use of the city's police power to protect the character of single-family residential neighborhoods. The nondiscriminatory nature of ECDC § 21.30.010 will be discussed in greater detail below. It is sufficient to point out here that where a group of more than five recovering alcoholics wanting to live in a single-family residential dwelling are "related by genetics, adoption, or marriage" and therefore constitute a family under ECDC § 21.30.010, they will not be precluded from doing so, handicap notwithstanding. Likewise, five or more unrelated individuals who are not handicapped will be prevented from living in a single-family residential dwelling on the same grounds and for the same reasons as residents of the Oxford House are prohibited from living together in numbers greater than five.

The ordinance's burden on recovering alcoholics and drug abusers is not onerous and leaves them with alternatives: like all unrelated persons, they may live in groups of more than five in areas of Edmonds zoned for higher density residential habitation, or they may live in groups of five or less in single-family areas. In view of Edmonds' long-standing and legitimate interest in maintaining the character of single-family areas, the ordinance is reasonable and, as a restriction on the maximum number of people who may inhabit a dwelling, it is exempt from the FHAA.

B. The Ninth Circuit's Ruling Violates Congressional Intent To Avoid Federal Interference in Fundamental Local Land Use Decisions

Congress intended the FHAA to prohibit discrimination on the basis of handicap. H.R. REP. NO. 711 at 2184. Because this Court has recognized that the power of local governments to zone and control land use is broad, *Schad v. Borough of Mount Ephraim*, 452 U.S. at 68, and that zoning laws are peculiarly within the province of state and local legislative authorities, *Warth v. Seldin*, 422 U.S. at 508 n.18, the Ninth Circuit's interpretation of the FHAA is more invasive of the province of local government than is warranted to accomplish Congress' intent.

In deference to local governmental authority, the Eighth Circuit has affirmed the ability of local communities to apply zoning controls in the form of distancing requirements for group homes, despite a resulting restriction on the housing choices of the disabled. *Familystyle of St. Paul, Inc. v. City of St. Paul*, 728 F. Supp. 1396 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991). *See also Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989) (applying similar reasoning to uphold a zoning ordinance limiting the residency of unrelated adults when applied to a shelter for battered women). The decision of the Ninth Circuit in this case explicitly rejects the reasoning of the Eleventh Circuit, and it also conflicts with the position of the Eighth Circuit of the United States Court of Appeals as well.

Congress cannot have intended to require numerous cities to either rewrite their zoning ordinances or be subject to federal control on basic land use decisions because it included a straightforward exemption for such decisions in the FHAA.

This is particularly so where the zoning ordinance in question is incapable of being discriminatorily applied. The operation of the ordinance does not depend upon the result of a discretionary review of circumstances, which discretion might be exercised discriminatorily. Edmonds' zoning restriction applies where two objectively quantifiable elements exist: (1) more than five individuals are living in the home and (2) those individuals are not related. Thus, where there is no threat or possibility of handicapped individuals being discriminated against, exempting zoning ordinances imposing occupancy limits based on relatedness does not violate either the spirit or the letter of the FHAA.

It must be pointed out that Edmonds' restriction on the number of unrelated persons who may live together does not prevent Oxford House from operating in a single-family residential dwelling. ECDC § 21.30.010 only works to prevent more than five residents from occupying any single-recovery facility. If Oxford House could arrange its administrative affairs so as to be able to function with that number of residents, there would be nothing in Edmonds' zoning code to prevent Oxford House from operating in a single-family residential area.

As discussed above, the disabled are not experiencing discrimination because of their disabilities but rather because of their desire to live in a high-density arrangement in a low-density neighborhood. Edmonds' ordinance treats all unrelated groups evenhandedly, and the FHAA will protect the disabled from any discrimination they may encounter when they choose to live in smaller groups in low density neighborhoods. In short, the Ninth Circuit's interpretation of the FHAA exceeds the nondiscriminatory treatment of the disabled which Congress intended.

**THE FAIR HOUSING
ADMENDMENTS ACT OF 1988 WOULD
BE UNCONSTITUTIONAL AS INTERPRETED**

**A. The Intent of the Ratifiers of the
United States Constitution Limits
Congress to Its Enumerated Powers**

In 1787, the individual states of this nation were presented with a new Constitution that provided for a federal system in which certain enumerated powers were delegated to the national government. Many of the ratifiers of the Constitution, however, feared that the national government would ignore the jurisdictional restraints imposed on it by the proposed Constitution in the form of its few and defined delegated powers and threaten state sovereignty and personal liberty. See generally Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 U. VA. L. REV. 1387 (1987). Such a government, located thousands of miles from its constituents, could, many thought, become isolated from its constituents, corrupt, and self-perpetuating. "After we have given them all our money, established them in a federal town, given them the power ... to establish their arbitrary government, what resources do the people have left?"

II THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787 at 62 (Jonathan Elliot ed., 2d ed. 1836) (ELLIOT'S DEBATES).

Many of the ratifiers predicted that the powers granted to the federal government by the proposed Constitution

would result in the despotism of an unresponsive aristocracy within the federal district. See generally IV ELLIOT'S DEBATES, *supra*, at 313.

In an attempt to calm these fears and assure ratification, the Federalists claimed that the structure of the Constitution would actually protect state sovereignty and personal liberty. THE FEDERALIST NO. 10 (James Madison). Madison described this structure in THE FEDERALIST NO. 52:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

Id. at 323 (James Madison) (Clinton Rossiter ed., 1961). That the power was divided between the two governments is evident in the text of the Constitution itself, with "the great and aggregate interests being referred to the national, the local and particular to the State legislatures." THE FEDERALIST NO. 10, at 83 (James Madison) (Clinton Rossiter ed., 1961). "The powers reserved to the several States will extend to all objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." THE FEDERALIST NO. 45, at 292-93 (James Madison) (Clinton Rossiter ed., 1961). Certainly this would include local land use decisions.

By comparison, the powers delegated to the federal government were described as "few and defined." THE FEDERALIST NO. 45, at 292. These few and defined powers,

as described by de Tocqueville, "have been confined to a certain sphere; and although the despotism of the majority may be galling upon one point, it cannot be said to extend to all." Alexis de Tocqueville, *DEMOCRACY IN AMERICA* 170 (Henry Reeve trans., Henry Steele Commager, ed. 1839). Those who opposed the ratification of the proposed Constitution were not convinced, however. They wanted a Bill of Rights to assure state sovereignty and individual liberty. In the Virginia ratification debates, for example, George Mason wondered why, if these two items were not "given up, where are they secured? Let the gentlemen show that they are secured in a plain, direct, unequivocal manner." III ELLIOT'S DEBATES, *supra*, at 266. See also George Mason, "Objections to the Constitution," reprinted in I THE DEBATE, *supra*, at 345-49. After the Constitution was ratified these two items were secured by the Bill of Rights, which includes the Tenth Amendment's reiteration of the textual limits on the federal government. *New York v. United States*, 505 U.S. ___, 120 L. Ed. 2d 120, 137-38 (1992).

It should be noted that the characterization of the powers of the federal government as few and defined came before the adoption of the Bill of Rights. In fact, Hamilton predicted that the adoption of a Bill of Rights would give the federal government the "colorable pretext" to run roughshod over the jurisdictional restraints imposed on it in the text of the Constitution by legislating right up to the edge of whatever individual rights were enumerated. THE FEDERALIST NO. 84, at 513 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

B. The Constitutional Basis for the Fair Housing Act of 1968's Ban on Racial Discrimination Cannot Apply to the FHAA's Ban on Discrimination Because of Handicap

At the time Congress considered passage of Title VIII of the Fair Housing Act of 1968 (FHA), Pub. L. No. 90-284, 82 Stat. 81 (1968), the constitutional basis for its ban on racial discrimination in housing was thought to be the Enforcement Clause of the Fourteenth Amendment and the Commerce Clause, U.S. Const., Art. I, § 8, Cl. 3. Robert G. Schwemm, HOUSING DISCRIMINATION: LAW AND LITIGATION 6-1 (CBC 1994) (citing Dubofsky, *Fair Housing: A Legislative History and a Perspective*, 8 WASHBURN L. J. 149, 152 n.15 (1969)). However, this Court held soon after Title VIII's passage that the ban on private housing discrimination was a valid exercise of Congress' power to enforce the Thirteenth Amendment. Schwemm, *supra*, at 6-1 to 6-2 (citing *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 437-44 (1968)). Since that time, lower courts have relied on *Jones* and the Thirteenth Amendment to uphold the FHA in the face of constitutional attack. Schwemm, *supra*, at 6-2 (citing cases).

The Thirteenth Amendment cannot sustain Congress' interference in this case with local zoning under the FHAA. First, Congress addressed familial status and handicap in the FHAA, not race. Second, Edmonds' zoning scheme does not discriminate on the basis of handicap, as discussed above. Rather, it operates to prevent all nonrelated persons, not just handicapped persons, from living in groups of more than five people in single-family neighborhoods. For example, fraternity members, sorority members, college students, transients, the elderly, and people of modest means are likely to live in congregate arrangements. All these people would be barred from living in such an arrangement in a single-family

neighborhood in the City of Edmonds, not because of some identified characteristic, but rather because Edmonds' zoning scheme protects the character of such neighborhoods by precluding high density living arrangements.

Further, because Edmonds' zoning scheme does not discriminate against the handicapped, the Fourteenth Amendment is not available to justify congressional action under the FHAA in this case. Therefore, only the Commerce Clause remains to sustain the constitutionality of the FHAA. Amicus curiae will demonstrate that the Commerce Clause cannot justify the FHAA in this case.

C. The Commerce Clause Provides No Constitutional Basis for Congress' Interference with Local Land Use Decisions in the Fair Housing Amendments Act of 1988

1. The Commerce Clause Should Be Interpreted To Limit Congressional Authority To Activities That Are Commerce Among the Several States

At the outset, it is clear that the Commerce Clause provides Congress substantial authority to regulate activities that directly or indirectly affect commerce. *E.g.*, *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 276-77 (1981).² Even so, the original

² This is not to say that there are no serious misgivings from legal scholars. Professor Epstein, for example, believes that the New Deal expansion of the Commerce Clause resulted from faith in the benevolence of the national government but was based on questionable legal logic. See Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. at 1449-554.

purpose of the Commerce Clause was to quell interstate trade rivalries and to meet the challenges of foreign competition. THE FEDERALIST NO. 42, at 266-69 (James Madison) (Clinton Rossiter ed., 1961). Even in *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1 (1824), which is often cited for the broad power Congress has under the Commerce Clause, this Court declared that federal power to regulate commerce was "complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution." *Id.* at 196 (quoted in, *e.g.*, *United States v. Darby*, 312 U.S. 100, 114 (1941)) (emphasis added). One such limitation is that Congress can only regulate commerce. The *Ogden* Court defined "commerce" as "commercial intercourse." *Ogden*, 22 U.S. at 189-90; see also *United States v. Mennuti*, 639 F.2d 107, 109-10 (2d Cir. 1981) (noting that *Ogden*, *Wickard*, *Atlanta Motel*, *Jones and Laughlin Steel Company*, *Katzenbach v. McClung*, and *Perez* all involved businesses or their transactions). Samuel Johnson's DICTIONARY OF THE ENGLISH LANGUAGE (3d ed. 1765) defined commerce as "[i]ntercourse, exchange of one thing for another, interchange of anything; trade; traffick." Raoul Berger, *FEDERALISM: THE FOUNDERS' DESIGN* 123 (1987). This definition remains substantially unchanged to this day: "Exchange between men of the products of nature or art; buying and selling together; trading; exchange of merchandise." THE COMPACT OXFORD ENGLISH DICTIONARY 295 (2d ed. 1992).

Another limitation prescribed by the Commerce Clause is that the commerce must be among the several states. "The enumeration [of particular classes of commerce] presupposes something not enumerated." *Ogden*, 22 U.S. at 195. See also, *e.g.*, *Russell v. United States*, 471 U.S. 858, 859 n.4 and 860-61 (1985) (residential property substantially affected interstate commerce under federal arson statute only because it was used for commercial purposes). As this Court stated

in *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968), overruled on other grounds by *National League of Cities v. Usery*, 426 U.S. 833 (1976), federal power is limited to "commerce," and not all commerce but commerce ... among the several States. The expansion of enterprise has vastly increased the interests of interstate commerce but the constitutional differentiation still obtains." *Id.* at 196. The Constitution, read logically and with knowledge of the intent of the ratifiers, should limit congressional authority over an activity only if it was both "among the several States" and "commerce."

2. When Congress Relies on the Commerce Clause to Justify Legislation, There Must Be a Nexus Between Interstate Commerce and the Legislation

Though Commerce Clause jurisprudence has adapted through the transition from a local to a national economy, *Equal Employment Opportunity Commission v. Wyoming*, 460 U.S. 226, 247 (1983) (Stevens, J., concurring), its grant of authority, as discussed above, is not unlimited. The Commerce Clause was given its most generous interpretation in *Wickard v. Filburn*, 317 U.S. 111 (1942), a case described by Justice Douglas as having reached the "outward limits" of that clause. William O. Douglas, *The Court Years, 1939-1975* 50 (1980). In *Wickard*, federal regulation of wheat grown at home for home consumption was upheld on grounds that it was regulating activities that affect interstate commerce. Yet, the language of the statute at issue in *Wickard*, the Agricultural Adjustment Act of 1938, expressly addressed how "to avoid surpluses and shortages and the consequent abnormally low or high wheat prices and obstructions to commerce." 317 U.S. at 115 (emphasis added).

Wickard certainly involved an extraordinary use of the Commerce Clause. Although the wisdom of such generous New Deal interpretation of the Commerce Clause is open to some debate, it is the law. See Richard Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387. However, because of the logical and political difficulties inherent in such decisions, *id.*, *Wickard* ought to remain the outward limit of the Commerce Clause rather than using this litigation to expand the clause even beyond its present tortured extent.

Another seminal case in the history of Commerce Clause interpretation is *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), which upheld the constitutionality of the Civil Rights Act of 1964, primarily on the basis of the Commerce Clause. Section 201(c) of that Act contained a lengthy description of the nature of the activities that were found to affect commerce. This Court had little trouble finding that Congress' regulation of restaurants and hotels was necessary and proper to the regulation of activities that affect commerce. Similarly, the statute at issue in *Katzenbach v. McClung*, 379 U.S. 294 (1964), involved extensive legislative history of testimony and affidavits submitted to Congress by a multitude of witnesses. This Court held that while Congress made no formal findings, the congressional record was replete with evidence of the burdens placed on interstate commerce by racial discrimination in restaurants. This Court found that the focus of the legislation was to prevent "far-reaching" harm to commerce. 379 U.S. at 301. This Court relied heavily on the companion *Heart of Atlanta Motel* case, writing:

[T]he voluminous testimony [before the Senate and House Committees] present overwhelming

evidence that discrimination by hotels and motels impedes interstate commerce.

379 U.S. at 253. These cases are not precedent to authorize judicial findings of Commerce Clause authority where Congress made none and where no evidence to support such a finding is present in the congressional record.

Where the Commerce Clause has been used to justify congressional legislation, Congress has expressly referred to the Commerce Clause in the legislation. Nonetheless, Congress made no reference to the Commerce Clause in the FHAA, 102 Stat. at 1619-36, and it made only the vague statement in the FHA that "[i]t is the policy of the United States to provide, *within constitutional limitations*, for fair housing throughout the United States." FHA § 801, 82 Stat. at 81, *codified at* 42 U.S.C. § 3601 (emphasis added). When Congress fails to require a nexus with interstate commerce on the face of its enactment, it demonstrates that it did not adequately consider the intrusion it was effecting into matters traditionally and primarily left to the states. *E.g.*, *Gregory v. Ashcroft*, 501 U.S. ___, 115 L. Ed. 2d 410, 426, 430 (1991), *United States v. Bass*, 404 U.S. 336, 350 (1971). Further, the congressional record of the debate on the FHAA contains only a passing reference to the Commerce Clause. Senator Specter opined that the size of bathrooms in multiunit housing affects interstate commerce because "the [building] materials passed in interstate commerce." 134 Cong. Rec. S10541 (daily ed., Aug. 2, 1988) (remarks of Sen. Specter). Although a court reviewing legislation "must defer to a congressional finding that a regulated activity affects interstate commerce if there is any rational basis for such a finding," *Preseault v. Interstate Commerce Commission*, 494 U.S. 1, 17 (1990) (citing *Hodel* 452 U.S. at 276), these findings are too slender a reed to support the burden of a reasonable connection between

interstate commerce and local zoning schemes for single-family residential neighborhoods.

Despite the absence of any explicit reference to the Commerce Clause in the FHA and the FHAA, some lower federal courts have relied on the Commerce Clause to uphold the constitutionality of the ban on discrimination on the basis of familial status and handicap in the FHAA. Schwemm, *supra*, at 6-3 n.15 (citing *Seniors Civil Liberties Association, Inc. v. Kemp*, 965 F.2d 1030 (11th Cir. 1992); *Morgan v. Secretary of Housing and Urban Development*, 985 F.2d 1451, 1455-56 (10th Cir. 1993); *Pulcinella v. Ridley Township*, 822 F. Supp. 204, 210-11 (E.D. Pa. 1993). *But see Michigan Protection and Advocacy Service, Inc. v. Babin*, 799 F. Supp. 695, 727-42 (E.D. Mich. 1992), *aff'd on other grounds*, 18 F.3d 337 (6th Cir. 1994) (holding that Congress lacks power under the Fourteenth Amendment and the Commerce Clause to ban handicap discrimination in a case involving a home sale by one private party to another). Should this Court also find some sort of psychoanalyzed congressional intent, *Chisom v. Roemer*, 115 L. Ed. 2d at 378 (Scalia, J., dissenting), in the FHAA, the enumeration of Article I powers becomes meaningless, allowing Congress to reach into any area regardless of the nexus such conduct may have with interstate commerce. The justification of "commerce" cannot be bootstrapped onto every realm of human endeavor that may affect commerce in order to justify congressional involvement. The Commerce Clause does not justify congressional use of a "relatively trivial impact on commerce as an excuse for broad general regulation of state or private activities." *Maryland v. Wirtz*, 392 U.S. at 196 n.27. *See also* Laurence H. Tribe, *AMERICAN CONSTITUTIONAL LAW*, 313-14 n.2 (2d ed. 1988).

3. There Is No Rational Connection Between Local Housing Laws Affecting the Handicapped and Interstate Commerce

This Court outlined the proper test for determining whether a statute falls within the auspices of the Commerce Clause in *Hodel v. Indiana*, 452 U.S. 314, 323-24 (1981):

A court may invalidate legislation enacted under the Commerce Clause only if it is clear that there is no rational basis for a congressional finding that the regulated activity affects interstate commerce, or that there is no reasonable connection between the regulatory means selected and the asserted ends.

Thus, there must be a nexus between the regulated activity and interstate commerce. Under the rational basis to affect commerce test alone, any and every activity in the universe could be regulated because it would somehow affect commerce. Judicial inquiry is limited to discovering whether such a finding of nexus is rational and then to an inquiry into whether the regulatory scheme itself is rational.

On the first point of inquiry, as discussed above, in neither the language of the FHA nor of the FHAA did Congress claim to be acting under the Commerce Clause to bring local land use control within the federal ban on housing discrimination, and Congress made no findings that local zoning decisions affect interstate commerce. Although there was one meager reference, set out above, to interstate commerce in the congressional debate on the FHAA, that reference was to the movement of building materials in interstate commerce as a predicate for the FHAA's imposition of federal construction standards on multiunit rental dwellings. This has nothing to do with Congress'

decision to inject the federal government into local land use even when local zoning schemes do not discriminate against the handicapped as such. Congress cannot find that a particular activity affects interstate commerce, describe that activity in excessively general terms, and then conclude that all activities embraced by the general terms affect interstate commerce. See *City of Richmond v. J. A. Croson Company*, 488 U.S. at 506 (precluding a municipality from adopting a remedial policy in favor of minorities in general on the basis of discrimination against African Americans in particular).

On the second point of inquiry, even if Congress stated that it was acting under the Commerce Clause to enact the FHAA, the FHAA remains unconstitutional in this case. There is simply no reasonable connection between Congress' goal of forbidding discrimination in housing on the basis of handicap and the means it chose of interfering with the City of Edmonds' zoning scheme, which does not discriminate on the basis of handicap.

CONCLUSION

A local zoning ordinance placing occupancy restrictions on the number of persons who may occupy a single-family dwelling need not place limits on related persons as well as unrelated persons in order to be exempt from the application of FHAA's antidiscrimination provisions. The construction of FHAA's exemption provision adopted by the Ninth Circuit misinterprets Congress' intent behind the exemption and thereby leaves many local governments with the choice of either redrafting their zoning laws or having the federal government unduly intrude into their land use decisions.

This construction results in an unwarranted intrusion into the local government's ability to adopt the type of

nondiscriminatory occupancy limitations that it feels is most appropriate for its circumstances. Moreover, such intrusion is not justified under any of the enumerated powers held by Congress. Not only did the framers of the Constitution fail to provide Congress with such power, great care was taken to ensure the citizenry that such intrusion would not occur. Both the history of Congress' use of Commerce Clause power and specific statements made by Congress in adopting the FHAA indicate that Congress has overstepped the bounds of its constitutionally recognized powers by subjecting the ordinance at issue herein to FHAA oversight. Pacific Legal Foundation therefore urges this Court to recognize federal deference to local government's authority and autonomy and reverse the Ninth Circuit's decision and find that Edmonds' zoning ordinance is either exempt from FHAA provisions or, in the alternative, that the FHAA is unconstitutional as applied to the facts of this case.

DATED: December, 1994.

Respectfully submitted,

RONALD A. ZUMBRUN

*ANTHONY T. CASO

*Counsel of Record

ALAN W. FOUTZ

GREGORY W. MCCracken

Of Counsel

Pacific Legal Foundation

2151 River Plaza Drive, Suite 305

Sacramento, California 95833

Telephone: (916) 641-8888

Attorneys for Amicus Curiae,

Pacific Legal Foundation

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF EDMONDS,
v. *Petitioner,*

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.*,
and

UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF THE
INTERNATIONAL CITY/COUNTY MANAGEMENT
ASSOCIATION, U.S. CONFERENCE OF MAYORS,
NATIONAL ASSOCIATION OF COUNTIES,
NATIONAL INSTITUTE OF MUNICIPAL LAW
OFFICERS, COUNCIL OF STATE GOVERNMENTS,
AND NATIONAL LEAGUE OF CITIES
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

MICHAEL J. WAHOSKE
DAVID Y. TREVOR
DORSEY & WHITNEY
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600
Of Counsel

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the
Amici Curiae*

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QUESTION PRESENTED

Whether a municipal ordinance that limits to five the number of unrelated persons who may occupy a single-family zoned residence constitutes a "reasonable . . . restriction[]" regarding the maximum number of occupants permitted to occupy a dwelling" under 42 U.S.C. § 3607(b)(1).

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IN THE
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OCTOBER TERM, 1994

No. 94-23

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v. *Petitioner,*

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.,*
and

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**BRIEF OF THE
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AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

INTEREST OF THE *AMICI CURIAE*

Amici, organizations whose members include state, county, and municipal governments and officials throughout the United States, have a compelling interest in legal issues that affect state and local gov-

ernments. Land-use zoning is an important state function, which "has been specifically delegated to local governments by state legislatures through enabling acts in every state." Rutherford H. Platt, *Land Use Control: Geography, Law, and Public Policy* 178 (1991). Local governments' use of zoning to protect and enhance quality of life is longstanding and ubiquitous. "[L]and-use zoning is the most widespread local land-use control tool, in use in every major U.S. city (except the famous holdout, Houston, Texas) and many thousand smaller communities and counties." *Id.* at 166; see Martin A. Garrett, Jr., *Land Use Regulation* 3 (1987) ("By 1968, over 9,000 local governments exercised zoning powers, including 97 percent of all cities with over 5,000 population.").

As this Court has recognized, "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981). Zoning "may indeed be the most essential function performed by local government, for it is one of the primary means by which we protect that sometimes difficult to define concept of quality of life." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 13 (1974) (Marshall, J., dissenting).

One traditional use of zoning which has been recognized by the Court as legitimate is the zoning of areas for single-family residential use. See, e.g., *Belle Terre*, 416 U.S. at 8-9. The City of Edmonds, like many other municipalities, has made the reasonable legislative judgment that an occupancy limit on the number of unrelated persons permitted to reside in a single-family zoned residence is necessary to make the

single-family zoning designation meaningful. Such zoning choices fall squarely within the reasonable occupancy limitation exception to the Fair Housing Amendments Act, 42 U.S.C. § 3607(b)(1).

Amici also note that the City of Edmonds does not seek to exclude group homes for recovering drug addicts and alcoholics from the City. Group homes with up to five persons are permitted in single family zones, Pet. 8, and group homes are subject to no numerical limits in other parts of the City, where there is considerable rental housing stock available. See *id.* at 15.

Amici believe that the court of appeals erred in holding that the City of Edmonds' zoning ordinance is subject to invalidation under the substantive provisions of the Fair Housing Amendments Act. Because of the importance of this issue to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of this case.¹

SUMMARY OF ARGUMENT

The Edmonds ordinance, which sets a maximum occupancy limit for single-family zoned dwellings occupied by groups of unrelated persons, falls squarely within the Fair Housing Amendment Act's exemption for "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). Consequently, it is not to be scrutinized under the substantive provisions of the FHAA. The court of appeals' holding to the contrary conflicts with the

¹ The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

plain language of the statutory exemption, and finds no support in the legislative history.

1. As this Court has emphasized, "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The language of the FHAA exemption is clear and unambiguous: the terms of the FHAA have no applicability to any "reasonable" government restriction "regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). By its terms, the exemption is triggered when two requirements are met: (1) the restriction in question must "regard[] the maximum number of occupants permitted to occupy a dwelling"; and, (2) the restriction must be "reasonable." The Edmonds zoning ordinance meets both of these requirements.

On its face, the Edmonds zoning ordinance is a restriction "regarding the maximum number of occupants permitted to occupy a dwelling," 42 U.S.C. § 3607(b)(1), since it sets an occupancy limit of five for all single-family zoned dwellings occupied by unrelated persons. The court of appeals and the United States attempt to avoid the exemption's obvious applicability to the Edmonds ordinance by reading additional limitations into the statutory language. But, contrary to their suggestions, nothing in the broad language of the statutory exemption limits its scope to occupancy limits calculated by reference to minimum square footage per person or indicates that a cap on the absolute number of persons permitted in a particular type of dwelling would fall outside the exemption. Nor does the statutory exemption exclude from its broad coverage occupancy limits, like the one at issue here, that exempt groups of related persons.

The Edmonds zoning ordinance is also "reasonable." As this Court has recognized, "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981). Moreover, single-family zoning has been identified by the Court as a legitimate exercise of that broad power. See, e.g., *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

The Edmonds ordinance represents a reasonable legislative judgment as to the maximum number of unrelated persons that can feasibly reside in a dwelling in a single-family residential zone in a manner consistent with the goals and purposes of single-family zoning. Indeed, it provides more latitude to non-traditional "family" groups made up of unrelated persons than did the zoning ordinance upheld in *Belle Terre*, which permitted no more than two unrelated persons to share a single-family zoned dwelling. See 416 U.S. at 2. The fact that the occupancy limit applies only to unrelated persons does not make it unreasonable, especially given that the Court, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), indicated that zoning ordinances restricting the ability of related persons to reside together are constitutionally suspect.

Nor is there any question that the occupancy limit chosen—five persons—is reasonable. This limit far exceeds the size of the average household both nationally and within the City of Edmonds. See U.S. Bureau of the Census, *Statistical Abstract of the United States 1994* 59 (114th ed. 1994) (2.63 persons

per U.S. household in 1993); Pet. Br. 29 (2.41 persons per household in the City of Edmonds in 1990). The fact that the City could have chosen a different cut-off point does not diminish the reasonableness of its legislative judgment. *See Belle Terre*, 416 U.S. at 8.

2. Even if the Court finds it necessary to look beyond the statutory exemption's plain language to its legislative history, no different result obtains. Nothing in the legislative history indicates that Congress intended to exclude reasonable occupancy restrictions like the one at issue here from the statutory exemption. Instead, the legislative history suggests only an observation by the Committee that facially discriminatory measures, such as the law struck down in *Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985), would remain impermissible notwithstanding the statutory exemption. *See* H.R. Rep. No. 711, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2173, 2185, 2192. The legislative history certainly cannot be read to make the applicability of the exemption turn on whether the occupancy limit at issue meets the substantive requirements of the FHAA; such a reading would make the exemption meaningless.

ARGUMENT

I. THE EDMONDS ORDINANCE IS EXEMPT FROM THE SUBSTANTIVE STANDARDS OF THE FAIR HOUSING AMENDMENTS ACT UNDER THE PLAIN LANGUAGE OF 42 U.S.C. § 3607(b)(1)

The Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1619, makes it unlawful to discriminate against persons with disabilities in the rental or sale of a dwelling. *See* 42 U.S.C. § 3604(f)(2). Discrimination includes "a refusal to make reasonable accommodations" in rules and practices, where "such accommodations may be necessary to afford" persons with disabilities "equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(f)(3)(B). Certain regulations, however, are exempt from the substantive standards of the FHAA. Under 42 U.S.C. § 3607(b)(1), for example, "[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling."

The district court determined that the zoning ordinance of the City of Edmonds fell within the plain language of § 3607(b)(1) and granted summary judgment to the City. *See* Pet. App. 5a.² In reversing the district court and holding that the Edmonds zoning ordinance is subject to the substantive provisions of the FHAA, the court of appeals relied primarily on its interpretation of the legislative history and purposes of the FHAA rather than on the plain language of the statute. *See* Pet. App. 18a-25a. The

² In referring to the Petition Appendix, *amici* use the same consecutive pagination system as the United States. *See* U.S. Br. in Opp. 2 n.1.

court of appeals' reliance on these legislative materials was inappropriate and unnecessary because, as the district court recognized, the plain language of § 3607(b)(1) clearly covers the zoning ordinance at issue here.

It is axiomatic that "the starting point for interpreting a statute is the language of the statute itself." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Moreover, where the language of a statute is clear and unambiguous, no further "interpretation" is necessary; a clearly phrased statutory directive means what it says. See, e.g., *Ratzlaf v. United States*, 114 S. Ct. 655, 662 (1994) (despite "contrary indications" in legislative history, "we do not resort to legislative history to cloud a statutory text that is clear"); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2038 n.2 (1992) ("Suffice it to say that legislative history need not confirm the details of changes in the law effected by statutory language before we will interpret that language according to its natural meaning."). See also *Barnhill v. Johnson*, 112 S. Ct. 1386, 1391 (1992) ("appeals to statutory history are well-taken only to resolve 'statutory ambiguity'") (citation omitted).

Similarly, interpretations informed primarily by a court's sense of the broader purposes of a remedial statute (whether or not those purposes are expressed in the legislative history) are unsound if they ignore plain statutory language. The "purpose" of a complex piece of remedial legislation such as the FHAA is never a simple matter, and this Court has often recognized that the purpose of a statute is that which is expressed in its language:

[T]he purpose of a statute includes not only what it sets out to change, but also what it resolves to leave alone. The best evidence of that purpose is the statutory text adopted by both Houses of Congress and submitted to the President. Where that contains a phrase that is unambiguous—that has a clearly accepted meaning in both legislative and judicial practice—we do not permit it to be expanded or contracted by the statements of individual legislators or committees during the course of the enactment process.

West Virginia Hospitals, Inc. v. Casey, 499 U.S. 83, 98-99 (1991) (citations omitted). See also *Landgraf v. USI Film Products*, 114 S. Ct. 1483, 1508 (1994) ("Statutes are seldom crafted to pursue a single goal, and compromises necessary to their enactment may require adopting means other than those that would most effectively pursue the main goal.").

On its face, § 3607(b)(1) establishes only two requirements for its exemption to be triggered: (1) the restriction in question must "regard[] the maximum number of occupants permitted to occupy a dwelling"; and, (2) the restriction must be "reasonable." The language of the statute requires nothing more than these two elements; if a local, State, or Federal statute, regulation, or ordinance meets these requirements, its application is not limited by the FHAA.³ The Edmonds zoning ordinance meets both of these requirements.

³ As discussed below in more detail, much of the court of appeals' analysis is based on the notion that Congress simply could not have meant to draft an exemption to the FHAA as broad as the plain language of § 3607(b)(1), and that therefore additional requirements must be read into the statute to make it more consistent with the purposes of the FHAA gen-

A. The Edmonds Ordinance Is A Restriction "Regarding The Maximum Number Of Occupants Permitted To Occupy A Dwelling"

The Edmonds ordinance is a restriction "regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). It limits to five the number of individuals who can occupy a dwelling in the area of Edmonds zoned single-family residential, with an exception provided for families (*i.e.*, "persons related by genetics, adoption, or marriage"). See Edmonds Community Development Code ("ECDC") §§ 16.20.010, 21.30.010.⁴ Because the ordinance limits the number of individuals who can occupy a dwelling (albeit with an exception for families), it is a restriction "regarding" maximum occupancy.

Nothing in the language of § 3607(b)(1) limits its force to particular types of restrictions on maximum

erally and the court of appeals' reading of the legislative history. Such judicial revision of statutes is precisely what the plain language doctrine is designed to prevent.

⁴ ECDC § 16.20.010 allows "single-family dwelling units" as the only permitted "primary use" in a single-family residential zone. ECDC § 21.30.010 provides that "[f]amily means an individual or two or more persons related by genetics, adoption or marriage, or a group of five or fewer persons who are not related by genetics, adoption, or marriage and none of whom are wards of the court unless such wards are related by genetics, adoption, or marriage to all other members of such group living together in a dwelling unit."

Thus, together the provisions stipulate that no more than five persons may occupy a dwelling unit in a single-family residential zone, unless those persons are related by genetics, adoption, or marriage.

occupancy. Indeed, the exemption itself emphasizes its breadth, inasmuch as it applies to "any" restriction regarding maximum occupancy, not merely to certain types of occupancy restrictions or to restrictions that calculate maximum occupancy by certain methods. The only limitation imposed by the statute on the types of occupancy restrictions that are exempt is that the restrictions be "reasonable."

In particular, there is nothing in the language of the statute to support the court of appeals' and the United States' proposed distinction between "use" and "occupancy" restrictions. See Pet. App. 17a-24a; U.S. Br. in Opp. 13-14, 14 n.9. Relying on this distinction, the court of appeals framed this case as a choice between a "broad" reading of § 3607(b)(1) that includes "use" restrictions and a "narrow" reading that includes only "occupancy" restrictions. Pet. App. 17a-18a n.3.⁵ This choice is a false one. The language of the statute makes no distinction between restrictions that limit dwelling occupancy absolutely, by number of individuals per dwelling, and restrictions that regulate occupancy relatively, by number of individuals per square foot of living area; instead, § 3607(b)(1) exempts "any" restriction "regarding" the maximum number of persons "permitted to occupy a dwelling," without reference to the manner in which that number is calculated.

⁵ As an example of an "occupancy" restriction, the court of appeals cited § 503(b) of the Uniform Housing Code, which provides: "Every dwelling unit shall have at least one room which shall have not less than 120 square feet of floor area. Other habitable rooms, except kitchens, shall have an area of not less than 70 square feet. Where more than two persons occupy a room for sleeping purposes, the required floor area shall be increased at the rate of 50 square feet for each occupant in excess of two." See Pet. App. 20a-21a & n.4.

Nor is the Edmonds ordinance any less a restriction "regarding" maximum occupancy because it provides a specific exception for families. The plain language of § 3607(b)(1) exempts "any" restriction regarding maximum occupancy, not merely those that have no exceptions. Thus, aside from the question of whether a specific exception for families like that provided in the Edmonds ordinance is constitutionally required under this Court's decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), the presence of an exception for families in the Edmonds occupancy ordinance does not vitiate its status as a restriction "regarding the maximum number of occupants permitted to occupy a dwelling."

Moreover, any limitation of the exemption to regulations that have universal application would effectively read the exemption out of the statute. The class of occupancy restrictions that have no exceptions under any circumstances would be small, if not nonexistent. Had Congress intended to limit the scope of § 3607(b)(1) to such a narrow category of occupancy restrictions, it would not have used the inherently broad term "any" in describing that category. See *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992) ("statute must, if possible, be construed in such a fashion that every word has some operative effect").

B. The Edmonds Ordinance Is "Reasonable"

The Edmonds ordinance is also "reasonable" within the meaning of the statute. 42 U.S.C. § 3607(b)(1). It reflects a considered legislative judgment concerning the maximum number of unrelated persons that can feasibly reside in a dwelling in a single-family

residential zone in a manner consistent with the goals and purposes of single-family zoning.*

As this Court has recognized, "[t]he power of local governments to zone and control land use is undoubtedly broad and its proper exercise is an essential aspect of achieving a satisfactory quality of life in both urban and rural communities." *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61, 68 (1981). Single-family zoning is a longstanding and ubiquitous exercise of the police power. See, e.g., Garrett, *Land Use Regulation* at 3; E.C. Yokley, 6 *Zoning Law and Practice* § 35-64, at 177-79 (4th ed. 1978 & Supp. 1994). The legitimacy of preserving zones for single-family residential purposes has long been recognized by this Court. See, e.g., *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926); *Belle Terre*, 416 U.S. 1.

* To say that the City of Edmonds has made a reasonable legislative choice is not, of course, to say that its choice is the only reasonable choice that could have been made. Municipalities have adopted a wide variety of approaches to zoning issues, reflecting differing judgments as to the proper manner in which to balance relevant factors. For example, Houston, Texas (unlike every other major city in the country) has no zoning at all. See Platt, *Land Use Control* at 166. Moreover, municipalities may exercise choice in zoning matters only within the bounds set out by the State, from whom zoning power is delegated in the first instance. *Id.* at 178; see, e.g., Wash. Rev. Code § 35A.63.100(2). Hence, state laws and constitutions may constrain the exercise of zoning authority by local governments. Cf. Wash. Rev. Code § 35A.63.240. In any case, zoning judgments are fundamentally legislative ones that are to be made by the State or by the local government to whom power has been delegated. See *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) ("[Z]oning laws and their provisions, long considered essential to effective urban planning, are peculiarly within the province of state and local legislative authorities.").

Permitting five unrelated persons to reside together in single-family zones, as the City of Edmonds has done, is plainly a reasonable legislative resolution of the community's desire to permit nontraditional "family" groups within single-family zones, while avoiding the density-related problems that could result from allowing unlimited numbers of unrelated persons to live within such zones. Many other jurisdictions have enacted similar occupancy limits within their single-family zones. *See Elliott v. City of Athens*, 960 F.2d 975, 980 & n.6 (11th Cir.), *cert. denied*, 113 S. Ct. 376 (1992); *see also* Pet. App. 24a. In *Belle Terre*, this Court upheld a single-family zoning ordinance which limited to two the number of unrelated persons who could live together, recognizing the legitimacy of a municipality's interest in preserving the residential character of single-family neighborhoods. In support of its holding, the *Belle Terre* Court observed:

The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. This goal is a permissible one within *Berman v. Parker*, [348 U.S. 26 (1954)]. The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people.

416 U.S. at 9.⁷ *See also Elliott*, 960 F.2d at 982 (upholding zoning ordinance permitting no more than four unrelated persons to reside together in single-family zone, noting the municipality's "substantial interests in controlling density, traffic and noise in its single family districts and in preserving the residential character of such districts"). Indeed, the Edmonds ordinance goes further in accommodating unrelated persons who wish to live together in a group than did the ordinance upheld in *Belle Terre*, which allowed no more than two unrelated persons to reside together in a single-family zone. *See* 416 U.S. at 2.

The fact that the occupancy requirement applies only to unrelated persons does not make it unreasonable, given the Court's indication in *Moore* that limiting the number of related persons who may live together would present grave constitutional difficulties. *See generally* 431 U.S. at 498-500; *see also Elliott*, 960 F.2d at 980-81; *Doe v. City of Butler*, 892 F.2d 315, 321 (3d Cir. 1989). The City could rationally conclude that permitting unlimited numbers of related persons to share housing in a single-family zone is consistent with the "single-family" use, while the use of similar housing by unlimited numbers of unrelated persons might be inconsistent with the single-family character of the zone. The reasonableness of the specific policy chosen by the City is highlighted by the fact that the number of unrelated persons permitted to live to-

⁷ Although *Belle Terre* involved a constitutional challenge, the same considerations should apply here in determining whether the Edmonds ordinance is "reasonable." Indeed, in the zoning context, "reasonableness" has often been equated with constitutionality. *See Platt, Land Use Control* at 200 (in zoning challenges, "'[r]easonableness' is . . . used as a surrogate for 'constitutionality'").

gether, five, exceeds by a wide margin the size of the average household—both nationwide and in the City of Edmonds itself. In 1993, the average size of all American households was 2.63 persons, the average size of family households was 3.21 persons, and the average size of nonfamily households was just 1.24 persons. U.S. Bureau of the Census, *Statistical Abstract of the United States 1994* 59 (114th ed. 1994). More specifically, 1990 census data for the City of Edmonds indicate an average of only 2.41 persons per household. See Pet. Br. 29.

Neither the fact that the City of Edmonds could have chosen a different cut-off point (*e.g.*, four or six unrelated persons, rather than five), nor the fact that the line drawn may be in some instances underinclusive or overinclusive in achieving the City's purposes, diminishes the reasonableness of its judgment. In *Belle Terre*, the Court rejected just such an argument:

It is said, however, that if two unmarried people can constitute a "family," there is no reason why three or four may not. But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion is, however, a legislative, not a judicial, function.

416 U.S. at 8 (footnote omitted).

In sum, the statutory exemption does not require that maximum occupancy requirements be perfectly suited to their objectives or shown to be the optimal policy choice. The requirements need only be reasonable. The Edmonds occupancy requirement, which it has found necessary to effectuate its single-family zoning decisions, easily meets that test.

Because the Edmonds ordinance is a "reasonable" restriction "regarding the maximum number of occu-

pants permitted to occupy a dwelling," 42 U.S.C. § 3607(b)(1), the Court's inquiry is properly at its end. The Edmonds ordinance is exempt from the FHAA.

II. NOTHING IN THE LEGISLATIVE HISTORY OF THE FHAA REQUIRES THAT § 3607(b)(1) BE CONSTRUED IN A MANNER CONTRARY TO ITS PLAIN LANGUAGE

Even if legislative history is considered, the statutory exemption should still be held to apply to the Edmonds ordinance. As noted earlier, the court of appeals relied heavily on its reading of the legislative history of the FHAA to justify its interpretation of § 3607(b)(1). Not only is a reading of the legislative history unnecessary because the statutory language of the exemption is clear, there is nothing in the legislative history that would compel a result contrary to the language of the statute.⁸ Just last Term, in *NLRB v. Health Care & Retirement Corp.*, 114 S.Ct. 1778 (1994), the Court rejected as follows arguments based on a committee report:

"[I]t is the function of the courts and not the Legislature, much less a Committee of one House of the Legislature, to say what an enacted statute means." . . . [Isolated] statements [from a committee report] do not have "the force of law, for the Constitution is quite explicit about the procedure that Congress must follow in legislating."

Id. at 1784-85 (citations omitted).

⁸ This case should be resolved solely by reference to the plain meaning of § 3607(b)(1). *Amici* discuss the legislative history of the FHAA only because the court of appeals relied on that history in reversing the district court, and because *amici* anticipate that respondents will similarly rely on it in this Court.

In reviewing the legislative history of the FHAA, the court of appeals relied principally on a single paragraph in a report by the House Judiciary Committee. See Pet. App. 18a-20a. The paragraph reads in full:

[Section 3607(b)(1)] amends section 807 [of the FHA] to make additional exemptions relating to the familial status provisions. These provisions are not intended to limit the applicability of any reasonable local, State or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R. Rep. No. 711, 100th Cong., 2d Sess., reprinted in 1988 U.S.C.C.A.N. 2173, 2192.

This paragraph from the House Committee Report does not require this Court to ignore the plain meaning of § 3607(b)(1). Indeed, the second sentence of the paragraph fully supports the plain language reading. The sentence reiterates the application of the exemption to "any" reasonable restriction on maximum occupancy, and goes on to emphasize that the exemption applies to restrictions that limit occupancy by "dwelling unit." As does the similar language of § 3607(b)(1), the language of this passage thus emphasizes the relevance of the exemption to restrictions by dwelling unit rather than solely to "per square foot" restrictions. Moreover, the breadth of this sentence indicates that the examples of exempt restric-

tions set forth in the third sentence are merely that—examples of some restrictions that might be held to be reasonable under § 3607(b)(1). See *Elliott*, 960 F.2d at 980. The court of appeals nonetheless viewed these examples of exempted restrictions as an exclusive statement of the entire reach of the exemption. Such over-reliance on examples from legislative history was condemned by this Court in *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 649 (1990):

Moreover, and more generally, the language of a statute—particularly language expressly granting an agency broad authority—is not to be regarded as modified by examples set forth in the legislative history. An example, after all, is just that: an illustration of a statute's operation in practice. It is not, as the Court of Appeals apparently thought, a definitive interpretation of a statute's scope.

While statutes should be read carefully and with an eye toward fine distinctions, legislative history is valuable primarily when it makes a clear statement of the intended meaning of an otherwise unclear provision. The court of appeals erred by reading legislative history as though language in a committee report was the statute itself, with the canons of construction to be applied to that report, instead of being used to illuminate the statute.

The court of appeals linked its reading of the legislative history primarily to the last sentence of this paragraph, excluding the Edmonds ordinance from the protective force of the exemption because it does not apply to "all occupants". See Pet. App. 28a. In effect, the court of appeals used this phrase to read a type of "no exceptions" rule into the exemption, whereby restrictions that provided special treatment

for any class of residents were excluded. Not only is there no support in the language of § 3607(b)(1) for such a reading, the clause immediately following the phrase "all occupants" demonstrates that the concern was not whether the restriction on maximum occupancy had any exceptions, but rather whether the restriction discriminated specifically against a protected group. Because the ordinance does not discriminate against a protected group, it does not run afoul of this passage.

In this regard, it should be noted that the reference to discrimination contained in the last sentence of the paragraph on page 31 of the House Report, *see* 1988 U.S.C.C.A.N. at 2192, cannot logically be read to incorporate the substantive meaning given the term "discrimination" in the FHAA itself. If the only maximum occupancy restrictions that qualified for exemption under § 3607(b)(1) were those that passed review under the substantive provisions of the FHAA (*i.e.*, those that did not "discriminate" under the FHAA), the exemption would serve no purpose at all. A government entity seeking to defend a maximum occupancy restriction against an FHAA claim would have to defend that restriction as if § 3607(b)(1) did not even exist. Because Congress is presumed not to draft meaningless statutes, this reading of § 3607(b)(1) is presumptively incorrect.⁹

⁹ The contrary argument was made by Judge Kravitch in her dissent in *Elliott*. Judge Kravitch argued that "reasonableness" under § 3607(b)(1) depended upon whether the protected individuals had been provided "reasonable accommodation" as that term is defined in the FHAA. *Elliott*, 960 F.2d at 986-88 (Kravitch, J., dissenting). In other words, the application of the exemption was contingent on whether a substantive standard of the FHAA had been violated. The *Elliott* majority correctly pointed out the circularity of this

A far more plausible reading of the use of "discrimination" in the last sentence in the paragraph on page 32 of the House Report is to clarify that facially discriminatory zoning practices like the one struck down by this Court in *City of Cleburne v. Cleburne Living Center*, 473 U.S. 435 (1985) remain impermissible.¹⁰ A restriction like that in *Cleburne*, which applied onerous permit requirements to group homes for the disabled but did not apply those same requirements to group homes of similar size for non-disabled persons, would be prohibited even if it otherwise involved the maximum occupancy of a dwelling.¹¹ Because the Edmonds ordinance is facially neutral,¹² this concern is not applicable here.

reasoning: "[U]nder the dissent's construction, the only time the exemption could apply is when there is no statutory violation in the first place," thereby rendering the exemption a nullity. *Id.* at 984 n.12.

¹⁰ Thus, the reference to discrimination can be read as an acknowledgment of the constitutional limitations that exist independent of FHAA's substantive provisions. By noting these limitations, the passage reinforces that even the exception to the FHAA cannot be applied in a facially discriminatory manner.

¹¹ In *Cleburne*, the City of Cleburne required that special use permits be obtained for the operation of "[h]ospitals for the insane or feeble-minded, or alcoholic [sic] or drug addicts, or penal or correctional institutions," 473 U.S. at 436 (quoting Section 16 of the Cleburne zoning ordinance), but did not require such permits for the maintenance of boarding houses or other types of hospitals. *Id.* This Court held that such differential treatment was not rationally related to a legitimate governmental interest and therefore offended the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 448-50.

¹² Even the court of appeals recognized the facial neutrality of the Edmonds ordinance. *See* Pet. App. 23a n.5. ("Ed-

The court of appeals also based its holding on certain broad language in the House Report that discusses the aims of the FHAA generally. See Pet. App. 20a-24a (discussing passages from page 24 of the House Report, 1988 U.S.C.C.A.N. at 2185). Not only do these passages of the House Report plainly fail to discuss the scope of § 3607(b)(1), they do not support the proposition that the Edmonds ordinance should be excluded from that scope. A careful reading of the passages cited by the court of appeals reveals that they merely suggest that the FHAA applies generally to zoning decisions and practices, and affirm that discriminatory practices like those condemned by this Court in *Cleburne* are within the scope of the statute.

Because this case poses only the question of whether Congress specifically exempted a certain category of zoning restrictions from FHAA review, the view that the FHAA applies generally to zoning decisions and practices, see H.R. Rep. No. 711, at 24, 1988 U.S.C.C.A.N. at 2185 (“[t]he Committee intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices”), is not relevant. The application of the FHAA to zoning decisions and practices is a presupposition of this litigation, not a justification for narrowing the plain language of the exemption. Statements in the House Report about the general application of the FHAA to zoning decisions and practices thus have no bearing on this case except to highlight the reason why the scope of the exemption contained in § 3607(b)(1) is of significance.¹⁸

Edmonds’ ordinance is facially neutral because it treats handicapped and non-handicapped persons similarly.”).

¹⁸ Language indicating that the substantive provisions of the FHAA may include claims of disparate impact, see H.R.

The case against the plain language of the exemption also cannot be bolstered by the statement in the Report that the FHAA is “intended to prohibit the application of special requirements through land-use regulations, restrictive covenants, and conditional or special use permits that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community.” *Id.* Congress could hardly have meant that groups of handicapped individuals have the right to live wherever they choose under all circumstances; instead, this language merely underscores Congress’ intention that the FHAA apply to discriminatory restrictions like the one struck down by this Court in *Cleburne*, *supra*.

The relationship of *Cleburne* to the House Report is clear. Not only does the House Report cite *Cleburne* twice in the passages discussing the general purposes of the FHAA, see H.R. Rep. No. 711 at 24, 1988 U.S.C.C.A.N. at 2185, its description of the evil addressed by the FHAA closely tracks the facts of *Cleburne*. The language quoted above is illustrative in this respect. Similarly, the Report notes that discrimination “has been accomplished by such means as the enactment or imposition of health, safety or

Rep. No. 711, at 24, 1988 U.S.C.C.A.N. at 2185 (“[a]nother method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities”), is similarly irrelevant to the scope of § 3607(b)(1). The question before the Court is not whether, as a general matter, disparate impact analysis is permissible under the FHAA, rather it is whether the Edmonds ordinance should be exempt from such analysis in the first place. Thus, a conclusion that claims of disparate impact are generally cognizable under the FHAA says nothing about the scope of § 3607(b)(1).

land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families and groups of similar size of other unrelated people, these requirements have the effect of discriminating against persons with disabilities." *Id.* These passages bear a close resemblance to the type of discrimination held unconstitutional in *Cleburne* and thus do no more than affirm the general applicability of the FHAA to intentional discrimination against the disabled; they do nothing to limit the meaning of the plain language of § 3607(b)(1).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

MICHAEL J. WAHOSKE
DAVID Y. TREVOR
DORSEY & WHITNEY
Pillsbury Center South
220 South Sixth Street
Minneapolis, MN 55402
(612) 340-2600
Of Counsel

December 15, 1994

RICHARD RUDA *
Chief Counsel
LEE FENNELL
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 345
Washington, D.C. 20001
(202) 434-4850

* *Counsel of Record for the*
Amici Curiae

(14)
No. 94-23

RIDEN

JAN 17 1995

U.S. DEPT. OF JUSTICE

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994.

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE COUNCIL,
ET AL., AND UNITED STATES OF AMERICA,

Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

**BRIEF AMICUS CURIAE OF THE COMMON-
WEALTH OF MASSACHUSETTS AND THE
STATES OF ARIZONA, ARKANSAS, IDAHO, IOWA,
LOUISIANA, NEVADA, NEW MEXICO, TENNESSEE,
TEXAS, UTAH, WEST VIRGINIA, AND THE VIRGIN
ISLANDS IN SUPPORT OF RESPONDENTS**

SCOTT HARBURGHER

*Attorney General
of Massachusetts*

STANLEY J. EICHNER*

DONNA L. PALERMO

LEO T. SOBOKIN

Assistant Attorneys General

1 Ashburton Place, Room 1915

Boston, Massachusetts 02108

(617) 727-2300

*Counsel of Record

(Additional Counsel in Briefing Room)

BEST AVAILABLE COPY

GRANT WOODS
*Attorney General
of Arizona*

WINSTON BRYANT
*Attorney General
of Arkansas*

ALAN G. LANCE
*Attorney General
of Idaho*

THOMAS J. MILLER
*Attorney General
of Iowa*

RICHARD P. IEYOUNG
*Attorney General
of Louisiana*

FRANKIE SUE DEL PAPA
*Attorney General
of Nevada*

TOM UDALL
*Attorney General
of New Mexico*

CHARLES W. BURSON
*Attorney General and
Reporter of Tennessee*

DAN MORALES
*Attorney General
of Texas*

JAN GRAHAM
*Attorney General
of Utah*

(Additional Counsel on Inside Back Cover)

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Statement of Interest

The *amici curiae* Commonwealth of Massachusetts and the States and Territory identified on the cover of this brief, through their attorneys general, submit this brief in support of Respondents, urging affirmance of the court of appeals.

Amici have two compelling interests that will be addressed in this brief and leave to the respondents a comprehensive analysis of the issues before this Court. First, as major providers of services to individuals with handicaps, including a continuum of residential settings, the *amici* have a substantial interest in the development of homes for these individuals. Resolution of this case affects the states' development of community residences for not only persons recovering from drug or alcohol abuse, but also persons with mental illness, mental retardation, Alzheimer's disease and other handicaps.¹ The Fair Housing Amendments Act of 1988 ("FHAA"), Pub. L. No. 100-430, 102 Stat. 1623, protects important rights and has been an integral part of the effort to open to persons with handicaps residential neighborhoods previously off-limits as a

¹ The FHAA defines "handicap" broadly to mean "(1) a physical or mental impairment which substantially limits one or more of such person's major life activities, (2) a record of having such an impairment, or (3) being regarded as having such an impairment, but . . . does not include current illegal use of or addiction to a controlled substance." 42 U.S.C. § 3602(h). This is the same three-part definition of handicap which Congress previously used in the Rehabilitation Act of 1973, 29 U.S.C. § 706(7)(6).

result of discriminatory land-use rules. Zoning definitions of family, such as the one enacted by Edmonds which limit the number of unrelated persons, but not the number of related persons who may occupy a dwelling, are prevalent throughout the United States and frequently invoked to prevent the establishment of community residences. Construing 42 U.S.C. § 3607(b)(1) to exempt these ordinances would allow all individuals with handicaps living in community residences to be excluded from single-family zones without any scrutiny under the FHAA and would impair state agencies' efforts to provide these homes.

Second, states have a substantial and longstanding interest in preventing dangerous overcrowding in dwellings and preserving the exemption from the FHAA for the public health restrictions that combat overcrowding. The states, or in some cases their municipalities pursuant to a grant of state authority, restrict the **maximum** number of residents for a dwelling typically by requiring a minimum square footage for each occupant in a dwelling. Such restrictions differ in substance from zoning definitions of family, which merely define the types of groups permitted in the zoned area.

Historically, the states have played a major role in providing housing and other services to persons with handicaps. Until the 1960s, few non-institutional residential settings were offered by the states — one study found only 40 halfway houses operating in the entire United States in 1960. F. Randolph, P. Ridgeway, C. Sanford, D. Simoneau & P. Carling, *A National Survey of Community Residential Programs for Persons with Prolonged Mental Illness*, Center for Community Change through Housing & Support, Trinity College of Vermont, 6 (1991) ("*National Survey*").

In the decade preceding the enactment of the FHAA, there was a substantial increase in community residential services for persons with mental illness or mental retardation. A national survey found that the number of mental health organizations providing community residential services to persons with psychiatric disabilities increased by 125% in the two years between 1982 and 1984. *National Survey*, at 16. The rate of increase in the number of "beds" during that period was even more dramatic — from 8,515 in 1982 to 24,452 in 1984. *Id.*

Similarly, the number of persons with mental retardation or developmental disabilities in homes with 15 or fewer residents increased from 40,424 in 1977 to 131,161 in 1988. *Growth of Small, Residential Living Programs for the Mentally Retarded and Developmentally Disabled: Hearing before the Subcomm. on Regulation, Business Opportunities, and Technology of the House Comm. on Small Business*, 103d Cong., 1st Sess. 58, 70 (1993) (memo from Subcomm. Staff to Subcomm. Chairman) ("*House Hearing*"). By 1988, the year during which Congress enacted the FHAA, government spending for those same facilities increased from \$879 million in 1977 to \$5.6 billion in 1988, \$4.2 billion of which came from the states. *Id.* at 71.

Today, the states continue to play a major role in providing housing and other services to a wide range of persons with developmental disabilities, mental retardation, mental illness, AIDS/HIV, Alzheimer's disease, and other handicaps. The states provide a continuum of residential settings from supported housing² to community residences to state

² Supported housing programs enable persons with handicaps to live on their own or in another setting of their choice with appropriate services provided as needed. However, not all

institutions. See, e.g., Commonwealth of Massachusetts Executive Office of Health and Human Services, *A Plan for the Development of Community-Based Housing and Programs for the Clients of the Department of Mental Health and Mental Retardation*, 11 (1993) ("EOHHS Report").

The housing programs serving persons with mental retardation in Massachusetts illustrate the continuum of residential services provided by the states. Approximately 3,000 persons reside in group living situations within the community which are staffed twenty-four hours per day. As many as eight persons live in each of these residences with the majority living in homes for four or fewer. Commonwealth of Massachusetts, *Comprehensive Housing Affordability Strategy*, 55 (1993). The homes are located in residential neighborhoods affording the residents access to job opportunities, public transportation, social interaction and community services available to all citizens. Additionally, 1,600 persons live either alone or with another person with mental retardation in supported housing and 2,300 more persons reside in state institutions or schools. *Id.* at 54.

Community residences are a significant component of the continuum of services offered by the states. Nationally, in 1993, 164,353 persons with mental retardation were living in 37,358 community residences of six or fewer residents and 6,360 homes of seven to fifteen residents. T. Mangan, E. Blake, R. Prouty, K. Lakin, *Residential Service for Persons with Mental Retardation and Related Conditions: Status and*

persons with handicaps are appropriate for this type of program.

Trends Through 1993, 42 (1994) ("Status and Trends Through 1993"). The array of services in Wisconsin is illustrative of community residential programs in the various states. It has licensed 857 community residences, each with a capacity of three to eight persons, serving a variety of populations including persons with developmental disabilities, mental illness, and Alzheimer's disease. Residential settings as a whole in Wisconsin provide homes for over 1,500 persons with Alzheimer's disease and more than 2,500 persons with developmental disabilities. Other states provide similar residential services to persons with handicaps.³

³ Utah operates 256 different facilities for persons with mental retardation: 42 community residence homes for seven to eight persons; 22 community residence homes for four to six persons; and 192 supervised apartments for one to three persons. Missouri operates 762 community residence homes for persons with mental retardation or developmental disabilities which provide homes for over 5,100 persons with an average of 6.7 residents per home. Nevada has 12 community residences for persons with Alzheimer's disease and 26 homes for persons with mental retardation. Maryland has licensed 1,008 separate residences for persons with developmental disabilities with an average size of 3.54 persons providing homes for over 3,500 people. In addition, for persons with mental illness in Maryland there are 686 residences providing homes for over 1,800 people in settings averaging less than three persons per home and other community residences for up to eight persons with handicaps which provide homes for another 125 people.

In Massachusetts, the Department of Mental Retardation has residential programs located in 78% of the 351 cities and towns in the Commonwealth. More than 1,800 persons with mental retardation live in homes with four or fewer persons with 24-hour staff support. Another 1,131 persons reside in community

Looking ahead, the states are continuing to create and site new community residences. Massachusetts continues to develop four-person staffed homes for persons with mental retardation. Other states have similar programs: Idaho plans to triple the number of four-person homes it operates for persons with mental retardation; Wisconsin has seen the number of homes licensed for persons with handicaps increase steadily during the past several years — almost 50 homes each year for three to eight persons since 1991. In creating housing for persons with mental retardation, Maryland emphasizes community residences and supported housing. In addition, states operate loan funds under the ADAA, which provide seed money for the creation of new Oxford Houses every year. Thirty such homes are planned over the next three years in Missouri alone. As noted above, federal law requires these homes to have a minimum size of six persons. 42 U.S.C. § 300x-25.

The breadth of the development of community residences is reflected by the steady decline, nationwide, in the average

residences or Intermediate Care Facilities-Mental Retardation serving six to eight persons each. On behalf of persons with mental illness, Massachusetts provides residential services to over 4,600 persons in community residences with average sizes of 8 or less.

In addition, with funds provided pursuant to the Anti-Drug Abuse Act of 1988, 42 U.S.C. § 300x-25, (as amended 1992 "ADAA") most states support Oxford House-type programs for individuals recovering from alcohol or drug abuse, for which Congress has required a minimum of six persons. Missouri, for instance, has 36 such homes and Massachusetts has 14.

number of persons with mental retardation living in each residential setting from 22.5 in 1977 to 5.1 in 1993. *Status and Trends Through 1993*, at 32. Moreover, many more persons would like to avail themselves of these residential treatment services: Massachusetts has 2,066 names on its waiting list for housing for persons with mental retardation; Utah has 767 persons on its waiting list for residential treatment services.

Fiscal constraints and integration into the community are two of the factors motivating the states' development of community residences. Community residences, sometimes, are substantially less expensive than other residential settings, in some cases by as much as \$55,000 per year per person.⁴ In many cases, however, fiscal considerations also constrain states from offering residential settings smaller than three or four persons. For example, for persons with mental retardation requiring 24-hour support and a highly structured environment, as many do, a residential setting for one or two people can be prohibitively expensive because the staff serving one or two persons can also serve another two or three people. The size of the community residences run by the states illustrates this point: the homes for persons with Alzheimer's disease in

⁴ Governor's Special Commission on Consolidation of Health and Human Services Institutional Facilities, *Actions for Quality Care*, 9 (1991). Similarly, a study of costs related to facilities for individuals with mental retardation found substantial savings in the daily expenses for smaller (fifteen persons or less) as compared with larger facilities in ten of fourteen states studied. *Status and Trends Through 1993*, at 10.

Nevada all have room for 6 residents; the average size of homes for persons with developmental disabilities in Maryland is 3.54 persons; Massachusetts prefers to create new homes for no more than 4 persons with existing homes ranging in size up to 8 persons; in Utah the community residences range in size from 4 to 8 persons. Through these community residences, the states have chosen to create homes in the community for persons with mental retardation unable to live independently.

Community residences also provide an effective means for integrating people into the community. They offer one way for the states to offer support services to persons with handicaps while they live in residential neighborhoods which afford them access to the full range of social interactions available to others.

When developing community residences for persons with handicaps, the states strive to create a family-style home in the community. Idaho encourages "residential care facilities serving specific mentally ill and developmentally or physically disabled populations which are small in size to provide for **family and home-like arrangements.**" Idaho Code § 39-3304 (emphasis added). Many other states have similar statutes. See, e.g., Utah Code Ann. § 62A-5-102(2)(c) (1988) (promoting "integration into community life" for persons with disabilities); N.C. Gen. Stat. § 168-20 (1981) (describing state policy of providing handicapped persons with "the opportunity to live in a **normal residential environment**") (emphasis added); Ohio Revised Code Ann. § 5123.19(A)(2) (1993) (providing for "a **family setting**" for community residences for persons with mental retardation or developmental disabilities) (emphasis added); Chapter 205, Wisconsin Laws 1977 (providing that "a community living arrangement should be

located in a **residential area** . . . residents of the facilities should be able to live in a manner similar to the other residents of the area") (emphasis added); Health-Gen. Article Ann. Code of MD § 7-102(7) (describing state policy that people with developmental disabilities "live in surroundings as normal as possible"); Alaska Stat. § 47.33.005(1) (1994) (encouraging homes "that provide a **home-like environment** for . . . persons with a mental or physical disability") (emphasis added).

The states' emphasis on a family-like home is illustrated by the community housing Massachusetts continues to develop. For persons with mental retardation, Massachusetts creates a "home [for] those served, rather than a setting for treatment, programming or any other professional activity." *EOHHS Report* at 35. Massachusetts implements this objective in a number of ways. It promotes resident involvement in the location of the home and selection of the staff. *Id.* In addition, the homes are organized so that the residents may live together in a family style — sharing meals, for instance. Similarly, as Massachusetts creates housing for persons with mental illness, it seeks to provide "normal, natural homes integrated into their community surroundings." *EOHHS Report* at 5. Although the average size of these homes may vary from 3 to 8 persons and the level of support services may vary from minimal to intense, the governing regulations in all cases provide for a "family-style" model in a "normal home" environment. 104 C.M.R. § 17.13(4)-(7).

One of the homes developed in Massachusetts is located on a tree-lined street in a family neighborhood in a suburb north of Boston. In the home, six men and women with mental illness, between the ages of 35 and 69, live together as a

family. Like many families, these six people are engaged in their own full or part-time activities outside the home during the day. Again like a family, they share meals, household chores and social activities as they have throughout the two and one-half years they have lived together.

In siting community residences, the states often find that zoning ordinances, including those defining family as Edmonds has done, are invoked in an attempt to exclude a group of persons with handicaps from living in a single-family neighborhood. Unlike the residents of fraternity houses and boarding homes at whom these rules aim, *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1973), however, many of the handicapped persons living in a group home cannot live in a single-family neighborhood except in a community residence, a fact recognized by this Court. *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432, 438, n. 6 (1985) (noting the district court's unchallenged finding that "[g]roup homes currently are the principal community living alternatives for persons who are mentally retarded.") Furthermore, the residents of group homes, in contrast to the residents of a fraternity or boarding house, live together in a manner akin to a family; hence the states endeavor to locate these homes in single-family neighborhoods and integrate the homes into these neighborhoods.⁵

The FHAA protects important rights of individuals with handicaps. Exempting from review under the FHAA the

⁵ In any event, the application of unrelated person rules to those not protected by the FHAA's substantive provisions is not subject to review under the FHAA.

Edmonds ordinance and the similar ordinances of other municipalities would impair the efforts of state agencies to develop community residences and cause the exemption in 42 U.S.C. § 3607(b)(1) to eviscerate the statute as applied to community residences. *Amici* therefore urge this Court to affirm the decision below.

Summary of Argument

The Edmonds ordinance defining "Family" falls outside of the plain meaning of the FHAA exemption for "any reasonable local, State, or Federal restriction regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). The legislative history of the FHAA confirms this plain meaning of § 3607(b)(1), and any other result would defeat the purpose of the Act. Accordingly, the decision below should be affirmed.

1. Efforts to construe § 3607(b)(1) should begin with the plain and unambiguous language of the exemption. *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). By using the terms "the maximum number" of occupants in "a dwelling," § 3607(b)(1) exempts only restrictions identifying the highest or greatest number of persons who may reside in a particular dwelling. Use of the word "the" indicates further that there can be one, and only one, such maximum per dwelling. The Edmonds ordinance has an entirely different purpose; it defines, with reference to the term "Family," the types of groups that may reside in a single-family district.

This definition of family authorizes an unlimited number of related individuals to occupy "a dwelling." It imposes no

numerical limitation whatsoever and certainly not "the maximum" restriction on the number of occupants per "dwelling." The five-person rule for unrelated persons included within Edmonds' definition of family, moreover, always can be exceeded by the unlimited number of related persons permitted in a dwelling. The Edmonds ordinance thus does not qualify as a restriction on "the maximum number" of occupants permitted in "a dwelling."

In addition, the Edmonds definition of family plainly limits not the "number" of occupants per "dwelling" but the types of groups defined as a family and the types of uses permitted in the area zoned. See *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 (1977) (stating zoning definitions of family "impose limits on **types of groups** that could occupy a dwelling unit"). Another type of rule, on the other hand — public health regulations limiting the number of occupants in relation to the per square feet of floor space — has been recognized as restricting the maximum number of occupants per dwelling. See *Moore*, 431 U.S. at 500 n. 7; *id.* at 520 n. 16 (Stevens, J. concurring). Such per-square-footage requirements are included in several model housing codes, including that promulgated in 1986 by the American Public Health Association and Center for Disease Control, which uses language strikingly similar to the plain language of the exemption. E. Mood, *American Public Health Ass'n - Centers for Disease Control, Recommended Minimum Housing Standards* (1986) ("APHA-CDC"). Compare § 3607(b)(1) (exempting restrictions regarding "the maximum number of occupants permitted to occupy a dwelling") with § 2.51 of the APHA-CDC code (defining "[p]ermissible occupancy" as "the

maximum number of individuals permitted to reside in a dwelling unit . . . "). In using the phrase "the maximum number" of occupants per "dwelling," therefore, Congress meant to exempt and did exempt restrictions like the per-square-footage requirements, but not zoning definitions of "Family" like the Edmonds ordinance.

2. Although the plain meaning of § 3607(b)(1) is clear, insofar as there is any ambiguity, consulting the legislative history is appropriate, *Garcia v. United States*, 469 U.S. 70, 75 (1984), and here confirms the plain meaning. The legislative history makes clear that Congress intended to subject to review under the FHAA not only rules imposing requirements on persons with handicaps without imposing them on others, but also otherwise neutral rules and regulations, such as the Edmonds' ordinance, that make housing unavailable to individuals with handicaps. Moreover, the legislative history of § 3607(b)(1) in particular explains that restrictions upon occupancy fall within the exemption only when they apply to all occupants. The five-person rule in the Edmonds' ordinance applies only to unrelated occupants, and thus falls outside the scope of § 3607(b)(1).

3. The purpose of the Fair Housing Act also supports the plain meaning of § 3607(b)(1). The language of the Fair Housing Act is "broad and inclusive," *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972). Because it is a remedial statute, its exemptions should be construed narrowly. The FHAA makes it "unlawful . . . to discriminate [on the basis of handicap] . . . or to **otherwise make [housing] unavailable**," a term of art with broad application. 42 U.S.C. § 3604(f)(1) (emphasis added).

Shielding the Edmonds ordinance and similar zoning definitions of family, as a matter of law, from any review on the merits under the FHAA would defeat the goal of having the Act's substantive provisions apply to otherwise neutral zoning policies and practices which make housing unavailable on the basis of handicap.

Argument

I. THE PLAIN LANGUAGE OF SECTION 3607(B)(1) DEMONSTRATES THAT ZONING DEFINITIONS OF "FAMILY" ARE NOT EXEMPTED FROM THE FAIR HOUSING AMENDMENTS ACT OF 1988.

The narrow issue decided below by the district court and the court of appeals was whether, pursuant to 42 U.S.C. § 3607(b)(1), the Edmonds zoning ordinance defining "Family" for purposes of its single-family zone is exempt from the substantive provisions of the Fair Housing Amendments Act of 1988. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802, 803 (9CA 1994).⁶ Under § 3607(b)(1), "reasonable local, State, or Federal restrictions

⁶ Contrary to the argument in petitioner's brief at 11, a holding affirming the decision below will not "overturn Euclidian zoning and thereby the definition of family" upheld in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1973). The court of appeals expressly declined to consider the merits of whether the ordinance violates the FHAA. *City of Edmonds*, 18 F.3d at 807. The court of appeals thus reversed and remanded the case to the district court for further findings. *Id.*

regarding the maximum number of occupants permitted to occupy a dwelling" are exempt from review under the FHAA. Consideration of whether the Edmonds definition of "Family" is an occupancy restriction within the scope of 42 U.S.C. § 3607(b)(1) must begin with the plain meaning of the exemption. *Consumer Product Safety Commission v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

By its terms, § 3607(b)(1) exempts only those restrictions which identify the highest or greatest number of persons who may reside in "a dwelling" (i.e. "the maximum" number of occupants per "dwelling") and which are otherwise reasonable. The Edmonds ordinance has an entirely different purpose; it defines, with reference to the term "Family," who may reside in a single family district and is therefore clearly outside the exemption. As discussed below, when Congress enacted § 3607(b)(1), it did not exempt zoning regulations generally. Rather, it exempted rules designed to protect the public health by preventing overcrowding in a dwelling, such as per-square-footage requirements, which often mirror the plain language of § 3607(b)(1).⁷

⁷ Compare Section 3607(b)(1) (exempting restrictions regarding "the maximum number of occupants permitted to occupy a dwelling") with the model housing code of the American Public Health Association and Center for Disease Control which defines "[p]ermissible occupancy" to mean "the maximum number of individuals permitted to reside in a dwelling unit"

A. *Edmonds' Definition of Family Does Not Restrict "the Maximum Number" of Occupants Per "Dwelling."*

The only permitted primary uses in single-family residential zones in Edmonds are "single-family dwelling units." Edmonds Community Development Code ("ECDC") § 16.20.010(A)(1). A "single-family dwelling unit" is a "detached building used by one family, limited to one per lot." ECDC § 21.90.080. The ordinance at issue in this case is the section of the Edmonds Community Development Code which defines the term "Family:"

Family means an individual or two or more persons related by genetics, adoption, or marriage or a group of five or fewer persons who are not related by genetics, adoption, or marriage

ECDC § 21.30.010. Petitioners contend that this provision is within the exemption as imposing "a limit" on occupancy because it effectively precludes more than five unrelated persons from residing together in a single-family district. Petitioner's Brief at 11, 12, 14, 15.⁸ However, the plain language of § 3607(b)(1) defines a far narrower exemption than would reach the Edmonds ordinance.

By its terms, § 3607(b)(1) exempts only restrictions which

⁸ As set forth in section I(B) *infra*, the definition of family in the Edmonds ordinance does not directly restrict the number of occupants permitted in a dwelling, it merely describes the types of groups permitted to reside in the single-family zone.

establish a single maximum number of occupants permitted to occupy a dwelling. "Maximum" is defined as the "greatest in quantity or highest in degree attainable or attained." Webster's 3rd New International Dictionary 1396 (unabridged) (1961). Significantly, "maximum" is preceded in § 3607(b)(1) by "the," which is "used as a function word to indicate that a following noun or noun equivalent refers to someone or something that is unique or is thought of as unique or exists as only one at a time." *Id.* at 2368. Thus, in § 3607(b)(1), "the maximum number" refers to one, and only one, "highest" or "greatest" number of occupants permitted to occupy a particular dwelling.

ECDC § 21.30.010 clearly is not such an occupancy restriction. It merely defines "Family" in the "normal and customary meaning[]" of the term, ECDC § 21.00.000, primarily as an **unlimited** number of related persons who occupy a dwelling, or a modest number (here, five) of individuals who are not related and are not wards of the state. With regard to related persons, the Edmonds ordinance imposes no limitation whatsoever on the number of persons who may occupy a dwelling in a single-family district.

Moreover, ECDC § 21.30.010 does not restrict "the maximum number" for "a dwelling" merely because it imposes a limit on a subgroup of occupants permitted to reside in the single-family zone — those who are not related and are not wards of the state. This purported "limit" on unrelated persons may be and often is less than the total number of related persons who occupy a dwelling in the single-family zone. Petitioner's brief illustrates how it is the per-square-footage requirement in the Uniform Housing Code ("UHC"), and not ECDC § 21.30.010, which establishes "the maximum number"

for "a dwelling:"

For example, assume a single-family house in Edmonds has square footage that would allow a total of **eight** adults under the UHC. Any number of related family members could reside there, up to eight. If a family decided to let rooms, a permitted use, the total number of residents would again be limited to **five**.

Petitioner's Brief at 14 (citation omitted and emphasis added). In Petitioner's example, the five-person limit for unrelated persons obviously is not "the maximum number" of persons permitted to occupy "a dwelling" in an Edmonds single-family zoning district. At most, the Edmonds ordinance may impose a limitation on certain types of people under certain circumstances, which can be exceeded by other limitations on other types of people under other circumstances. Such a purported "limit" certainly does not qualify as "the maximum number" of occupants permitted for "a dwelling" under § 3607(b)(1).⁹

⁹ For the same reasons, there is no merit to the argument that Edmonds' definition of family falls within § 3607(b)(1) because it speaks in terms of "any" restrictions "regarding" maximum occupancy. The potential breadth of the terms "any" and "regarding" does not change the plain language of the unique and limiting phrase they modify, "the maximum number" — i.e., the section applies **only** to "any restrictions regarding the **maximum** number" of occupants in "**a dwelling**."

B. The Edmonds Ordinance Regulates The Character of the Area Zoned But Does Not Restrict the Maximum Number of Occupants Within a Dwelling.

Edmonds' definition of "Family" in § 21.30.010 falls within Title 21.00 of the ECDC, entitled "DEFINITIONS — GENERAL." Section 21.30.010 merely states that "Family" means either: (1) an individual, (2) an unlimited number of related individuals, or (3) five or fewer unrelated individuals. This definition becomes a "restriction" only indirectly, because the word "Family" is used in ECDC chapter 16.20, entitled "*RS - SINGLE-FAMILY RESIDENTIAL*," which lists under the heading "Permitted Primary Uses" "1. Single-family dwelling units." ECDC § 16.20.010(A). The five-person figure described by the Petitioner as an occupancy limit is simply part of a description of one of three categories of occupants that falls within the definition of "Family". This section thus merely lists the different types of groups or "uses" permitted within the single-family zone. See Petitioner's Brief at 9.

This same characterization of the definition of family for purposes of single-family zoning was recognized in *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 498 (1977).¹⁰

¹⁰ Although *Moore* is cited in *Elliott v. City of Athens*, 960 F.2d 975 (11CA), *cert. denied*, 113 S. Ct. 376 (1992), for its statement regarding the "sanctity of marriage" in constitutional analysis, *Moore* is more relevant to the analysis here under the FHAA for its discussion of the distinction between zoning definitions of family and per-square-footage restrictions. The plain meaning arguments to which this aspect of *Moore* relates were never addressed in *Elliott*, which was decided on the basis of legislative history. 960 F.2d at 979-80.

The Court's analysis began with the recognition that a definition of family for single-family zoning purposes, such as that in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), merely "imposed limits on the types of groups that could occupy a dwelling unit." *Moore*, at 498. The Court went on to reject East Cleveland's attempt to justify its strict definition of family for zoning purposes, *inter alia*, "as a means of preventing overcrowding." *Id.* at 500. Similarly, in his concurrence, Justice Stevens recognized that "restricting the composition of a household is . . . not reasonably related" to "prevention of overcrowding in residences." *Id.* at 520, n. 16 (citations omitted).

The definition of "Family" in ECDC § 21.30.010 is similarly unrelated to limiting the number of occupants per dwelling in single-family districts. The expressed purposes underlying Edmonds' residential zoning rules make no mention of attempting to limit "the maximum number" of occupants within "a dwelling." Rather the zoning ordinance aims:

- A. To reserve and regulate **areas** primarily for **family living** in single-family dwellings.
- B. To provide for additional non-residential **uses** which complement and are compatible with single-family dwelling use.

ECDC § 16.20.000 ("Purposes") (emphasis added). This zoning provision therefore, as Petitioner concedes, is like other zoning provisions — designed to restrict an "area" or neighborhood to those groups or "uses" defined as "family living." See Petitioner's Brief at 9-11.

ECDC § 21.30.010 thus resembles the zoning ordinances

in *Village of Belle Terre* and *Village of Euclid, Ohio v. Ambler Realty*, 272 U.S. 365 (1926), which "classi[fied] land use in a given area into . . . categories." *Village of Belle Terre*, 416 U.S. at 3 (emphasis added). An example of a "restricted-use ordinance," *Id.* at 3-4, Edmonds' definition of family, like that in *Belle Terre*, "has restricted **land** use to one-family dwellings." *Id.* at 2 (emphasis added). While *Belle Terre* established that such a zoning definition of family would survive rational basis scrutiny under the Fourteenth Amendment, it also illuminated the nature of such an ordinance as "a **land** use project addressed to family needs." *Id.* at 9 (emphasis added). Rather than regulating conditions within dwellings, such zoning ordinances "lay out **zones** where family values, youth values, and the blessings of quiet seclusion and clean air make the **area** a sanctuary for people." *Id.* (emphasis added); *cf. Village of Euclid, Ohio*, 272 U.S. at 388 (characterizing zoning as "power . . . to forbid the erection of a building of a particular kind or for a particular use").

A definition of family that restricts the types of uses permitted in the area zoned does not regard "the maximum number" of occupants permitted within each "dwelling" in the area. Edmonds' definition of family for this reason also falls outside the plain meaning of § 3607(b)(1).

C. Square Footage Requirements, at the Local, State, and Federal Level, Are Commonly Understood to Define the Maximum Number of Individuals Permitted to Reside in a Dwelling Unit.

Another type of regulation, also widely enacted, does define "the maximum number" of occupants permitted in "a dwelling:" public health regulations requiring a minimum amount of floor space for each occupant of a dwelling. Edmonds has such a rule, as do many other jurisdictions; the Center for Disease Control has promulgated a model statute whose language § 3607(b)(1) follows in large part; and the Court has recognized that these rules establish "the maximum number" of occupants for "a dwelling."

As noted above, the City of Edmonds incorporated into its code the per-square-footage requirement of the Uniform Housing Code which requires a minimum amount of floor space for each occupant of a dwelling. ECDC § 19.10.000. This approach to restricting the maximum number of occupants permitted in a dwelling has been followed at the local, State, and Federal level.¹¹

¹¹ The Court recognized East Cleveland's square footage restriction. *Moore*, 431 U.S. at 500 n. 7. Massachusetts requires a minimum of 150 square feet of floor space for the first occupant and at least 100 square feet for each additional occupant. 105 C.M.R. § 400.015. Rhode Island requires a minimum of 150 square feet for the first occupant and at least 130 square feet for each additional occupant. Rhode Island General Laws § 45-24.3-11 (1956). California, like the City of Edmonds, has adopted the UHC which establishes minimum square footage requirements based upon the number of

Per-square-footage requirements restrict the number of occupants per dwelling in a "common manner" that has been recognized by this Court — that is, in relation to the square footage of inhabitable space within the dwelling. *Moore v. East Cleveland*, 431 U.S. 494, 500 n. 7 (1977); *id.* at 520 n. 16. (Stevens, J., concurring in judgment). In fact, the Court recognized that square footage requirements establish "the maximum permissible occupancy of a dwelling." *Id.* (emphasis added); *see also id.* at 520 n. 16 (Stevens, J. concurring in judgment) (stating communities can prevent "overcrowding" by limiting the number of occupants "in relation to the available floor space") ; *cf. City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. at 450 (1985) (observing that per-square-footage requirement addresses overcrowding). Moreover, the American Public Health Association and Center for Disease Control ("APHA-CDC") 1986 model housing code, § 2.51, defines "[p]ermissible occupancy" in a manner strikingly parallel to § 3607(b)(1) as "the maximum number of individuals permitted to reside in a dwelling unit . . ." and recommends specific square footage minimums.¹² *See* 42 U.S.C. § 3607(b)(1) ("the maximum

occupants. West's Ann. Cal. Health and Safety Code § 17922(a)(1). At the federal level, the Department of Housing and Urban Development ("HUD") has adopted similar dwelling overcrowding restrictions for the property it owns and funds. 24 C.F.R. § 100.10 (1994).

¹² As early as 1953, a Presidential Commission recognized the predecessor to the APHA-CDC standards, promulgated only by the APHA. 1953 United States President's Advisory

number of occupants permitted to occupy a dwelling").¹³

Square footage requirements, such as those promulgated by APHA-CDC, aim to reduce public health risks that typically accompany overcrowding, such as the increased probability of (1) transmission of infectious diseases (tuberculosis, skin diseases, and certain digestive system diseases); (2) stress on plumbing, washroom and bathing facilities that could heighten risk of transmission of disease; (3) home accidents and fire hazards; (4) problems in social development and social relationships among occupants; and (5) other psychological, physiological, and sociological injuries. *See, e.g., Nolden v. East Cleveland City Comm'n*, 12 Ohio Misc. 205, 210-211, 232 N.E.2d 421, 425-26 (1966). The importance of these public health regulations explains Congress' decision to exempt them from the FHAA in § 3607(b)(1).

Since long before the passage of the FHAA in 1988, therefore, square footage requirements at the local, State and Federal level have been commonly understood to define "the

Committee on Government Housing (Dec. 1953), Ex. 5 entitled "Analysis of Space Occupancy Standards for Dwellings as Provided in Regulations of Certain Localities and States."

For the full text of § 9.02 of the APHA-CDC standards, see Appendix attached hereto.

¹³ In enacting § 3607(b)(1), therefore, Congress would be presumed to be knowledgeable about the existing "local, State, or Federal" maximum occupancy restrictions described in the text, this Court's discussion of such restrictions and the model code promulgated by the Center for Disease Control. *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174 (1988).

maximum number" of individuals permitted to reside in "a dwelling unit." In using the phrase "reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling," therefore, Congress meant to exempt, and did exempt in § 3607(b)(1), only restrictions that establish the maximum number of occupants for a particular dwelling, square footage requirements for example, and **not** zoning restrictions regulating the character of or uses permitted in an area.¹⁴

II. THE LEGISLATIVE HISTORY OF THE FHAA MAKES CLEAR THAT CONGRESS DID NOT INTEND TO EXCLUDE FROM REVIEW LAND-USE POLICIES AND PRACTICES THAT MAY HAVE THE EFFECT OF MAKING HOUSING UNAVAILABLE TO PERSONS WITH HANDICAPS.

As the legislative history of the FHAA makes explicit,¹⁵ a fundamental purpose of the Act was "to end the unnecessary exclusion of persons with handicaps from the American mainstream." H.R. Rep. No. 711, 100th Cong., 1st Sess. 18 (1988), *reprinted in* 1988 U.S.C.C.A.N. 2173, 2179 ("House

¹⁴ Accordingly, the Court need not decide whether the Edmonds ordinance is "reasonable" under § 3607(b)(1).

¹⁵ *Amici* contend that the plain meaning of § 3607(b)(1) is clear as set forth *supra*. However, to the extent there is any ambiguity, this Court may look to the legislative history as "an additional tool of analysis." *Garcia v. United States*, 469 U.S. 70, 75 (1984).

Report"). Congress understood the importance of "prohibiting discrimination against individuals with handicaps [as] a major step in changing the stereotypes that have served to exclude them from American life." *Id.* Recognizing that "[t]he right to be free from housing discrimination is essential to the goal of independent living," *id.*, the legislation "clearly prohibits the use of stereotypes and prejudice to deny critically needed housing to handicapped persons." *Id.*

As a result of "prejudice and aversion," individuals with handicaps have experienced housing discrimination. *Id.* In the specific context of "congregate living arrangements for persons with handicaps," *id.* at 23, Congress understood that the "authority to . . . regulate use of land has sometimes been used to restrict the ability of individuals with handicaps to live in communities." *Id.* at 24. Congress intended the substantive provisions of the FHAA to apply to "state or local land-use practices or decisions which discriminate against individuals with handicaps," *id.* and, specifically, "intend[ed] that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices." *Id.*

As the legislative history makes clear, Congress appreciated the fact that housing is "made unavailable" in a number of ways. While Congress was concerned about instances where discrimination results from "the enactment or imposition of land use requirements on congregate living arrangements among non-related persons with disabilities . . . [that] are not imposed on families and groups of similar size of other unrelated persons," *id.*, its concern and the scope of the statute were broader. As the legislative history explicitly states, Congress was specifically aware of the fact that "[a]nother

method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations . . . on land use in a manner which discriminates against people with disabilities." *Id.* (emphasis added) (footnote omitted). Housing made unavailable through "[t]hese and similar practices would [also] be prohibited." *Id.*

The legislative history also confirms that the exemption of § 3607 was not meant to remove zoning restrictions on unrelated persons from the reach of the FHAA. As the House Report states, reasonable limitations by governments, such as limits on "the number of occupants per unit based on a minimum number of square feet in the unit" may "continue, as long as they were **applied to all occupants.**" *House Report* at 31 (emphasis added). In order for a numerical restriction on occupancy to fall within the purview of § 3607, it must apply to all occupants. Indisputably, the five-person rule in the Edmonds ordinance does not so apply, and thus does not qualify for the exemption in § 3607(b)(1).

III. INTERPRETING SECTION 3607(B)(1) TO APPLY TO ZONING DEFINITIONS OF FAMILY, SUCH AS THE EDMONDS ORDINANCE, WOULD BE INCONSISTENT WITH THE PURPOSE OF THE FHAA.

Although "the starting point for interpreting any statute is the language of the statute itself," *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980), the Court cannot interpret a statute in a manner that directly conflicts with the overall purpose and goals which Congress

intended it to serve. *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349 (1968). This is particularly true where the Court interprets remedial statutes, such as the Fair Housing Act, liberally to accomplish their goal. *Peyton v. Rowe*, 391 U.S. 54, 65 (1968). This Court has held that the language of the Fair Housing Act is "broad and inclusive," *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 209 (1972), and should be construed generously to ensure the prompt and effective elimination of discrimination in housing. *Id.* at 211-212. Similarly, the Court has noted that "any exemptions from . . . remedial legislation must therefore be narrowly construed," *A.H. Phillips, Inc., v. Walling*, 324 U.S. 490, 493 (1945), cited with approval in *Commissioner of Internal Revenue v. Clark*, 489 U.S. 726, 739 (1989).

In the 1988 amendments to the Fair Housing Act, Congress added a new prohibition against housing discrimination on the basis of handicap, making it "unlawful . . . to discriminate . . . or to otherwise make unavailable" housing based upon handicap. 42 U.S.C. § 3604(f)(1) (emphasis added). The key phrase, "otherwise make unavailable" is a well-established term of art in the context of federal fair housing legislation, which the courts have historically applied to a wide range of conduct to prohibit "all practices which have the effect of denying dwellings on prohibited grounds," *United States v. American Institute of Real Estate Appraisers*, 442 F. Supp. 1072, 1079 (N.D. Ill. 1977); including, for example, racially exclusionary land-use practices by a municipality, *United States v. Black Jack, Missouri*, 508 F.2d 1179, 1184 (8CA 1974), cert. denied, 422 U.S. 1042 (1975); racial "steering," *United States v. Mitchell*, 580 F.2d 789, 791 (5CA 1978); and "redlining"

by financial institutions, *Laufman v. Oakley Bldg. & Loan Co.*, 408 F. Supp. 489, 493 (S.D. Ohio 1976). "[I]n the absence of a contrary indication, this Court assumes that when a statute uses terms of art, Congress intended it to have its established meaning." *McDermott International v. Wilander*, 498 U.S. 337, 342 (1991).

As an exemption to a broad remedial statute, § 3607 should be interpreted narrowly and certainly no more broadly than necessary to address its plain purpose and language. Accordingly, assuming *arguendo*, that there is ambiguity in the plain meaning of the section, it is the narrower interpretation of the exemption which limits its effect on the Act's broad substantive non-discrimination provisions, that must prevail.

What Congress understood in 1988 to be true about the critical need to redress land-use policies and practices which have a discriminatory effect on individuals with handicaps is just as true in 1995. In their efforts to develop and establish such residences as part of their continuum of housing opportunities in the community, the states continue to encounter barriers that result from the application or enforcement of neutral zoning rules and regulations.

Consistent with the clear congressional pronouncement to address housing discrimination against persons with handicaps and to remove those barriers resulting from "zoning decisions and practices . . . that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community," *House Report* at 24, the states have continued to move forward with their efforts to establish community housing. The FHAA is an important safeguard against discriminatory interference with those efforts. Construing the § 3607 exemption broadly to encompass zoning definitions of

family thus would directly conflict with the overall purpose and goals which Congress intended the FHAA to serve, *FTC v. Fred Meyer, Inc.*, 390 U.S. at 349, and would negate its general purposes. *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 419-420 (1973). In addition, such a broad construction would deprive the states of an important tool for addressing barriers to the establishment of community living opportunities for their citizens with handicaps.

Conclusion

For the foregoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Ninth Circuit.

SCOTT HARSHBARGER

*Attorney General
of Massachusetts*

STANLEY J. EICHNER*

DONNA L. PALERMINO

LEO T. SOROKIN

Assistant Attorneys General

1 Ashburton Place, Room 2019

Boston, Massachusetts 02108

(617) 727-2200

**Counsel of Record*

Date: January 17, 1995

Appendix

Section 9.02 of the APHA-CDC model housing code states as follows:

9.02.01 For the first occupant there shall be at least one hundred fifty (150) square feet of floor space and there shall be at least one hundred (100) square feet of floor space for every additional occupant thereof. Floor space is to be calculated on the basis of total habitable room area.

9.02.02 In every dwelling and dwelling unit of two (2) or more rooms, every room occupied for sleeping purposes by one occupant shall contain at least seventy (70) square feet of floor space and every room occupied for sleeping purposes by more than one occupant shall contain at least (50) square feet of floor space for each occupant thereof.

DARRELL V. MCGRAW, JR.
*Attorney General
of West Virginia*

ROSALIE SIMMONDS BALLANTINE
*Attorney General of the
Virgin Islands*

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No. 94-33

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CITY OF EDMONDS,
v. *Petitioner,*

WASHINGTON STATE BUILDING CODE COUNCIL
and UNITED STATES OF AMERICA,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

AMICUS CURIAE BRIEF OF THE
AMERICAN ASSOCIATION OF RETIRED PERSONS
IN SUPPORT OF RESPONDENTS

STEVEN S. ZALKINICH
MICHAEL SCHUMPER
BRUCE B. VIGNERY *
DOROTHY M. SIMON
DEBORAH M. ZUCKERMAN
AMERICAN ASSOCIATION OF
RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-3120
* Counsel of Record

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IN THE
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OCTOBER TERM, 1994

 No. 94-23

CITY OF EDMONDS,
 v. *Petitioner,*

WASHINGTON STATE BUILDING CODE COUNCIL
 and UNITED STATES OF AMERICA,
 _____ *Respondents.*

On Writ of Certiorari to the
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 for the Ninth Circuit

 AMICUS CURIAE BRIEF OF THE
 AMERICAN ASSOCIATION OF RETIRED PERSONS
 IN SUPPORT OF RESPONDENTS

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Association of Retired Persons ("AARP") is a not-for-profit membership organization of more than thirty-three million persons aged 50 and older. In representing the interests of its members, AARP seeks to (a) enhance the quality of life for older persons; (b) promote independence, dignity, and purpose for older persons; (c) advance the role and place of older persons in society; (d) sponsor research on physical, psychological, social, economic, and other aspects of aging; and (e) support the expansion of quality, well-managed and accessible housing options for older persons.

AARP's membership includes many older persons with disabilities, and the Association supports their right to equal choice in housing. Accordingly, the Association advocated for the provisions of the Fair Housing Amendments Act of 1988 extending equal housing opportunities to persons with disabilities and prohibiting unreasonable exclusionary local land-use laws and ordinances.

Exclusionary zoning and land-use laws often limit housing opportunities for older persons with disabilities.¹ This case involves the application of a zoning ordinance to a group home for persons with disabilities related to previous alcohol and drug dependencies, but the legal principles established will likewise affect group living arrangements for older persons with a range of other disabilities.

The threat of exclusion from community life because of unreasonable zoning restrictions is real to the many older Americans now living in non-institutional group settings. Although the overwhelming majority of older persons want to live independently, either by themselves, with family, or with assistance from professional caretakers provided in their homes, health or financial problems sometimes force them into other arrangements.

A wide variety of group living arrangements exists for older persons with disabilities. A growing number of such people live in group living arrangements sometimes referred to as board and care homes. These homes provide

¹ See, e.g., *Casa Marie, Inc. v. Superior Court of P.R.*, 752 F. Supp. 1152 (D.P.R. 1990), *vacated*, 988 F.2d 252 (1st Cir. 1993) (zoning ordinance and restrictive covenant used to challenge facility for older mostly handicapped persons); *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. 1285 (D. Md. 1993) (elderly group home residents with Alzheimer's disease threatened with eviction because of group home provider's failure to give neighbors notification as required by county licensure law); *United States v. City of Taylor*, 798 F. Supp. 442 (E.D. Mich. 1992), *rev'd sub nom.*, *Smith & Lee Assocs., Inc. v. City of Taylor, Mich.*, 13 F.3d 920 (6th Cir. 1993) (city ordinance defined family to exclude elderly and disabled residents of a group home).

shelter, food, personal care, and 24-hour protective oversight in single-family dwellings in residential neighborhoods. The identical living arrangement is sometimes referred to by many other names, e.g., assisted living facilities.² In order to simplify the discussion, this brief uses the term board and care home.

AARP acknowledges the right of state and local governments to restrict land use, so long as the restrictions do not result in unlawful discrimination. In some cases, though, even facially neutral land-use restrictions result in discriminatory treatment. Older persons have too large a stake in preserving equal access to housing to let such restrictions go unchallenged. AARP submits this brief as *amicus curiae* to inform the Court of a dimension to this case not immediately apparent from the facts—the large, and growing, numbers of older persons with disabilities who are no longer able to live independently and their need for a variety of housing options.³

STATEMENT OF THE CASE

AARP adopts the Respondents' Oxford House, Inc. et al. statement of the case.

² A recent survey found that states license board and care homes under more than 25 different names. Catherine Hawes et al., *The Regulation of Board and Care Homes: Results of A Survey in the 50 States and the District of Columbia* i (1993). Some common names are domiciliary care homes, personal care homes, community residence facilities, group homes, assisted living facilities, adult foster care homes, and residential care facilities. See, e.g., *Wolford by Mackey v. Lewis*, 860 F. Supp. 1123, 1126 n.2 (S.D. W. Va. 1994) for a description of one state's regulation of "residential board and care" and "personal care homes." Use of these terms varies not only from state to state, but also within a state and by the nature of the client population served. Vincent Mor et al., *A National Study of Residential Care for the Aged*, 26 *Gerontologist* 405, 405 (1986).

³ The written consents of the parties have been filed with the Clerk of the Court pursuant to Sup. Ct. R. 37.3.

SUMMARY OF THE ARGUMENT

A broad construction of the Fair Housing Amendments Act (FHAA) requires a narrow interpretation of the exemption for maximum occupancy rules. Such a reading is necessary to effectuate the purposes of the FHAA. It also is sound policy to limit unreasonably restrictive zoning ordinances because a continuum of housing options is necessary to fulfill the financial and social needs of board and care residents. Board and care homes are best defined by the functions they perform, i.e., providing room, board, personal care, and protective oversight on a 24-hour basis to four or more unrelated adults. Board and care home residents have disabilities that necessitate assistance with the activities of daily living and taking medications.

Although estimates vary, more than a million persons live in board and care homes. At least half of board and care residents have private sources of income and the other half are publicly funded through the Supplemental Security Income (SSI) program. Board and care is a growth industry because of its low cost and the growing number of older persons with disabilities. Board and care residents are handicapped persons for purposes of the Fair Housing Amendments Act, and the growing number of older persons with disabilities and their need for residential community-based arrangements should inform the Court's interpretation of the FHAA's exemptions. Projected population trends show just how great the need will be for non-institutional group living arrangements.

ARGUMENT

I. INTRODUCTION.

The Fair Housing Amendments Act (FHAA) prohibits discrimination against handicapped persons in housing practices. 42 U.S.C. §§ 3604(f)(1), (f)(3)(B) (1988).⁴ The FHAA also contains an exemption that provides: "Nothing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling" 42 U.S.C. § 3607(b)(1) (1988).

The Oxford House is located in Edmonds, Washington, and is a group home for six or more persons recovering from drug and alcohol dependencies. The residents qualify as handicapped persons by virtue of their participation in a supervised drug rehabilitation program, coupled with their non-use of drugs and alcohol. *City of Edmonds v. Washington State Bldg. Council*, 18 F.3d 802, 804 (9th Cir. 1994). Oxford House is located in a neighborhood zoned for single family dwellings, Edmonds Community Development Code § 16.20.000 et seq., and these dwellings are the only permitted primary uses. *Id.* at § 16.20.010 (A)(1). "Family means an individual or two or more persons related by genetics, adoption, or marriage, or a group of five or fewer persons who are not related by genetics, adoption or marriage. . . ." *Id.* at § 21.30.010. If the Code proscription against more than five unrelated persons living together qualifies as a maximum occupancy limitation, Oxford House cannot locate in an area zoned for single family dwellings in Edmonds.

AARP agrees with the legal arguments of the United States and other Respondents that the City of Edmonds' ordinance does not qualify for the Fair Housing Amend-

⁴ The terms handicapped persons and persons with disabilities are used synonymously in this brief, as they are in federal statutes. Compare the use of the term handicap in the FHAA definitions at 42 U.S.C. § 3602(h) (1988) with the term disability in the Americans with Disabilities Act at 42 U.S.C. § 12102 (Supp. V 1993).

ments Act exemption as a maximum occupancy limitation, and that this Court should uphold the Ninth Circuit's decision in *City of Edmonds v. Washington State Bldg. Council*, 18 F.3d 802 (9th Cir. 1994), rather than the decision in *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992).

AARP will emphasize that the remedial purposes of the FHAA require a narrow interpretation of the occupancy limitation exemption; that group homes play a vital role in the continuum of housing for older persons with disabilities; and that stifling the growth of group homes is unwise because of projected increases in the numbers of older persons with disabilities.

II. THE REMEDIAL PURPOSES OF THE FHAA AND SOUND PUBLIC POLICY REQUIRE A BROAD INTERPRETATION OF THE PROTECTIONS PROVIDED AND A NARROW CONSTRUCTION OF THE MAXIMUM OCCUPANCY LIMITATION EXEMPTION.

Discriminatory housing practices such as the exclusionary zoning ordinance in this case prompted Congress to pass the Fair Housing Amendments Act of 1988. One purpose of the FHAA was to extend the principle of equal housing opportunity to handicapped persons because "like the other classes protected by title VIII [handicapped persons] have been the victims of unfair and discriminatory housing practices." H.R. Rep. No. 100-711, 100th Cong., 2d Sess. 13 (1988), reprinted in 1988 U.S.C.C.A.N. 2173, 2174. Congress expressly recognized that exclusion from equal housing opportunity is a by-product of stereotyping persons with disabilities. "The Fair Housing Amendments Act, like Section 504 of the Rehabilitation Act of 1973 . . . is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. . . . Generalized perceptions about disabilities and unfounded speculations

about threats to safety are specifically rejected as grounds to justify exclusion." *Id.* at 18; 1988 U.S.C.C.A.N. at 2179. Congress also recognized that land-use regulations have been used to discriminate against persons with disabilities and the Fair Housing Amendments Act was designed to end those practices.

The FHAA was enacted to protect against the very type of ordinance Edmonds has adopted—rules that single out subgroups to be regulated under the guise of health and safety. The House Judiciary Committee Report expresses this best:

While state and local governments have authority to protect safety and health . . . that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities. (citation omitted) This has been accomplished by such means as the enactment or imposition of health, safety or land-use requirements on congregate living arrangements among non-related persons with disabilities. Since these requirements are not imposed on families . . . these requirements have the effect of discriminating against persons with disabilities.

Id. at 24; 1988 U.S.C.C.A.N. at 2185.

As a remedial statute, the FHAA's provisions should be afforded a broad construction. *Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972). A broad construction of the FHAA requires that the exemptions from the protections contained in the statute be construed narrowly to effectuate the statute's general purposes. *United States v. Columbus Country Club*, 915 F.2d 877, 883 (3d Cir. 1990), cert. denied, 501 U.S. 1205 (1991); *City of Edmonds*, 18 F.3d at 804; *Elliott*, 960 F.2d at 978-79; *Massaro v. Mainlands Section 1 & 2 Civic Ass'n*, 3 F.3d 1472, 1475-76 (11th Cir. 1993). Narrowly construed, the Edmonds ordinance is not an occupancy limitation at all because the ordinance re-

stricts use rather than occupancy and does not apply equally to related as well as unrelated persons.

Moreover, an expansive construction of the exemption leads to an anomalous result—by adopting restrictive zoning ordinances, communities can effectively deny persons with disabilities, including older persons with disabilities, equal access to housing. Congress, however, intended precisely the opposite. The FHAA stemmed from a history of unequal housing opportunity and, therefore, when, Congress carved out exemptions from the statute's coverage, it sanctioned only those ordinances which reasonably restrict occupancy; it did not create a loophole of the magnitude authorized by *Elliott*. *Elliott* is based, in part, on the idea that if the exemption applies equally to related and non-related persons, the exemption has little meaning. Unfortunately, however, if the broad exemption recognized by the *Elliott* court and the district court below is upheld, it is the FHAA's sweeping prohibition of discrimination against persons with disabilities in housing which is rendered ineffectual.

A. Board And Care Homes Provide Much-Needed Residential Services To Older Persons With A Range Of Disabilities.

Board and care homes are best defined by function: "provid[ing] room, board, personal care, and protective oversight on a 24-hour basis to four or more adults . . . who were not related to the facility operator." Nancy D. Dittmar, *Facility and Resident Characteristics of Board and Care homes for the Elderly*, in *Preserving Independence, Supporting Needs: The Role of Board and Care Homes* at 1, 2 (Marilyn Moon et al. eds., 1987); see also Chandra M.N. Mehrotra & Karl Kosloski, *Foster Care for Older Adults: Issues and Evaluations*, 12 Home Health Care Servs. Q. 115, 115-16 (1991); Hawes et al., *supra* note 2, at 3. Board and care homes encompass diverse living environments, but all "seek to serve the

nonmedical needs of residents who, because of their disabilities, cannot function independently." Alexander Chen, *The Cost of Operation in Board and Care Homes, in Preserving Independence, Supporting Needs: The Role of Board and Care Homes, supra*, at 61, 61.

Residents of board and care homes vary greatly, but older persons with disabilities constitute a substantial portion of the population of such homes.⁵ "[The] homes serve a very mixed group of residents, differentiated by a variety of characteristics, including age, types of impairments, and income level. Residents include people whose major reasons for being in a board and care home are age and physical frailty, often combined with a dearth of resources (monetary and familial)." Hawes et al., *supra* note 2, at 3. One researcher, after reviewing the board and care literature, concluded that "the typical elderly resident is a 70-year-old white female who has lived in the home for about three years and has never been married or is currently widowed." Sandra Newman, *The Bounds of Success: What is Quality in Board and Care Homes?, in Preserving Independence, Supporting Needs, supra*, at 109, 112.

The board and care population comes from the 4.4 million people aged 65 and older who experience difficulties in one or more activities of daily living. U.S. Senate Special Comm. on Aging et al., *Aging America: Trends and Projections* 144 (1991 ed.). Activities of daily living (ADLs) include bathing, ambulating, toileting, eating, dressing, and grooming. Mary Jane Koren, *Site-Specific Care, in The Merck Manual of Geriatrics* 199, 211 (William B. Abrams, M.D. & Robert Berkow,

⁵ The House Subcommittee identified the major populations as older persons who used to reside in old age or rest homes and deinstitutionalized persons with mental illnesses. Chairman, Subcomm. on Health and Long-Term Care, House Select Comm. on Aging, 101st Cong., 1st Sess. *Board and Care Homes in America: A National Tragedy* 2-3 (Comm. Print 1989).

M.D. eds., 1990). About 17.5 percent of persons 65 and older have deficits in instrumental activities of daily living (IADLs), activities such as shopping, cleaning, managing finances, and using the telephone. *Id.* at 153. The needs for assistance with ADLs, IADLs, and with taking medication, are the primary non-economic predicates for group home care. An estimated one million of these older persons with disabilities⁶ and other persons with disabilities live in board and care homes. *Board and Care Homes in America: A National Tragedy*, *supra*, at 9.⁷

B. Board And Care Homes Are A Vital Component Of The Continuum Of Care Necessary To Meet The Needs Of Older Persons With Disabilities.

The care needs of older persons with disabilities are increasingly diverse. A study of housing barriers faced by older women noted that mental and physical impairments, themselves, exist on a continuum depending on the nature and extent of the condition and the person's age. Bonnie Sether Hasler, *Barriers to Living Independently for Older Women with Disabilities: Housing* 19-21 (Patricia Forsythe & Laurel Beedon eds., 1991). As a consequence, needs vary from treatment and rehabilitation, to maintenance of the individual's highest possible quality of life, to reducing the effects of the disability. Providers must offer the services most appropriate for each client. *Id.*

⁶ Older persons with ADL problems sometimes are referred to as the "frail elderly," particularly in research literature.

⁷ As with all housing options, the quality of board and care homes varies. The House Subcommittee focused on board and care homes serving the poorest residents and found many problems. *Board and Care Homes in America: A National Tragedy*, *supra*, *passim*. Other observers of the same types of homes have not described the homes so negatively. See Dittmar, *supra*, at 3; Hawes et al., *supra* note 2, at 76.

Preservation and enlargement of available housing choices promote a better match between clients and the type of care they receive and will have a positive impact on the quality of life of older adults. The range of housing options for older persons extends from simple shelter for the most independent to skilled nursing facilities that provide a nearly total life support system for the frailest of older persons. Arthur E. Gimmy & Michael G. Boehm, *Elderly Housing: A Guide to Appraisal, Market Analysis, Development and Financing* 19 (1988). Board and care falls between the extremes of independent living and the total care environment of an institution.

A continuum of care permits the frequency and intensity of necessary care to dictate which option is most appropriate for each individual.⁸ This continuum enables older persons to live in the "least restrictive environment with the greatest amount of privacy for as long as possible. Loss of independence need not lead to permanent loss of self-esteem or loss of power to exercise competent choices and decisions in one's own life." Medical Care and Research Foundation, *Proving New Directions, New Hope in Board and Care: Practical Guidelines for Establishing and Operating Small Assisted Living Facilities for the Elderly* 3 (1988).

Board and care contributes a vital component on the continuum of care available to both older and younger persons with disabilities. One of the attractive features of board and care is that residents are able to benefit from more home-like settings in residential neighborhoods. Rosalie A. Kane et al., *Adult Foster Care for the Elderly in Oregon: A Mainstream Alternative to Nursing Homes?*, 81 Am. J. Pub. Health 1113, 1113 (1991). Group homes provide older persons with "the opportunity to live in home-like milieus instead of . . . more institutionalized

⁸ The term continuum of care is commonly used to describe the concept of matching services to needs. See, e.g., Terrie Wetle, *Social Issues*, in *The Merck Manual of Geriatrics*, *supra*, at 1127, 1129-32.

nursing homes" and prevent "premature institutionalization." *Potomac Group Home Corp. v. Montgomery County, Md.*, 823 F. Supp. at 1289. Some clients require the socially-oriented care setting of community residence for health reasons. Others simply prefer to obtain needed services in that setting. Kane, *supra*, at 1117-19.

Older persons with Alzheimer's disease illustrate the need for board and care type settings. According to the Alzheimer's Disease and Related Disorders Association (ADRDA), more than four million Americans have Alzheimer's disease. Alzheimer's Disease and Related Disorders Association Inc., Alzheimer's Disease Statistics [ADRDA Factsheet] (1993) (On file at AARP). Nearly 10 percent of this country's population over age 65 has Alzheimer's disease. *Id.*

Alzheimer's disease is a progressive, degenerative disease that attacks the brain and results in impaired memory, thinking, and behavior. The person with Alzheimer's disease may experience confusion, changes in personality and behavior, impaired judgment, and difficulty finding words, finishing thoughts, or following even simple directions. In short, the disease causes precisely the types of impairments which produce the need for assistance with activities of daily living.

Life expectancy from the onset of Alzheimer's symptoms varies from three to more than twenty years, but the individual variations are striking. The decline may be quick, with the full range of cognitive deterioration occurring in one year, or the person may plateau at a level of impairment for several years. Robert Katzman & J. Edward Jackson, *Alzheimer's Disease: Basic and Clinical Advances*, 39 J. Am. Geriatrics Soc'y 516, 520 (1991). In any case, the housing needs for persons with Alzheimer's disease correlate to their degree of dementia. Many physically healthy persons with Alzheimer's disease or related dementias can live nicely in a community setting with assistance and supervision, at least during the early

and middle stages of the disease. In the later stages, when total care is needed, a nursing home looms as the only alternative.

As the Alzheimer's example illustrates, board and care kinds of settings will not replace nursing home care, but will contribute a vital component on the continuum of care necessary to meet the needs of older persons. Yet these much-needed group homes for all kinds of persons with disabilities will not be available if local jurisdictions can limit occupancy to small numbers of unrelated persons like the City of Edmonds has done.

III. THE DEMAND FOR BOARD AND CARE TYPE SETTINGS WILL CONTINUE TO INCREASE BECAUSE THEY ARE MORE ECONOMICAL THAN NURSING HOMES AND THE NUMBER OF OLDER PERSONS WHO CANNOT FUNCTION INDEPENDENTLY IS GROWING DRAMATICALLY.

It is widely acknowledged that board and care is a growth industry. A Congressional Subcommittee predicted continued rapid growth for several reasons: the relatively low cost of board and care compared to nursing home care or care provided in mental hospitals, and the continued growth of the frail elderly population. *Board and Care Homes in America: A National Tragedy*, *supra*, at 11-12. According to surveys, "among the elderly residing in board and care homes, about half the residents pay for their care with private resources." Hawes et al., *supra* note 2, at 54.⁹ The other half are SSI recipients.¹⁰ Hawes

⁹ SSI is the primary public funding source. In one survey, the reported sources of income were SSI (51.3 percent), Social Security Disability and regular Social Security benefits (50.8 percent), social services benefits (18.9 percent), private retirement, investment, or savings income (12 percent), earned income (10.7 percent), family contributions (8.5 percent), and Veterans Administration benefits (7.7 percent). Dittmar, *supra*, at 14.

¹⁰ SSI, Title XVI of the Social Security Act, provides income support to persons aged 65 or older, blind or disabled adults and blind or disabled children, based on need. Disabled means any person

et al., *supra* note 2, at 54; Judith Feder et al., *Board and Care: Problem or Solution?*, in *Preserving Independence, Supporting Needs*, *supra*, at 27, 29. For the board and care residents who are SSI recipients, the costs of care will mirror the SSI benefit level. Dittmar, *supra*, at 14; Hawes et al., *supra*, at 57. The result is a cost efficient care model when compared to institutionalization.¹¹

A trade association, the Assisted Living Facilities Association of America, concurs that the need for assisted living—another name for some kinds of board and care homes—will grow. The “unique combination of housing, personalized assistance, supportive services and health care will be in greater demand as more . . . families seek compassionate, low cost care in noninstitutional environments. As advocates for the elderly focus more attention on this long-term care option, it will grow in recognition, availability and acceptance.” Coopers & Lybrand, *An Overview of the Assisted Living Industry* 22 (1993).¹²

unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment expected to result in death or that has lasted or can be expected to last for a continuous period of at least 12 months. 42 U.S.C. § 1382c(a)(3)(A) (1988). Individuals are ineligible for SSI if they have resources in excess of \$2,000. 42 U.S.C. § 1382(a)(3) (1988). The SSI payment is based on countable income, but an applicant must have little or no income to become eligible. The 1995 Federal monthly benefit rate for an individual is \$458. Thirty-five percent of the nearly 6 million SSI recipients in 1994 were aged 65 or older. *Id.*

¹¹ The House Subcommittee reported the average per person cost for board and care to be \$7,000 per year compared to \$25,000 for a nursing home placement (1988 average) and \$41,131 for a mental hospital (1987 average). *Board and Care Homes in America: A National Tragedy*, *supra*, at 11-12.

¹² Among the factors supporting future growth are greater acceptance of assisted living as a new alternative to institutionalization, conversion of nursing facilities to assisted living facilities, more private insurance, increased use of public funds for support in lieu of public support for nursing facility placement (i.e., increase in SSI rate or other federal support), increased life expectancy, and increased competition. Coopers & Lybrand, *supra*, at 22-23.

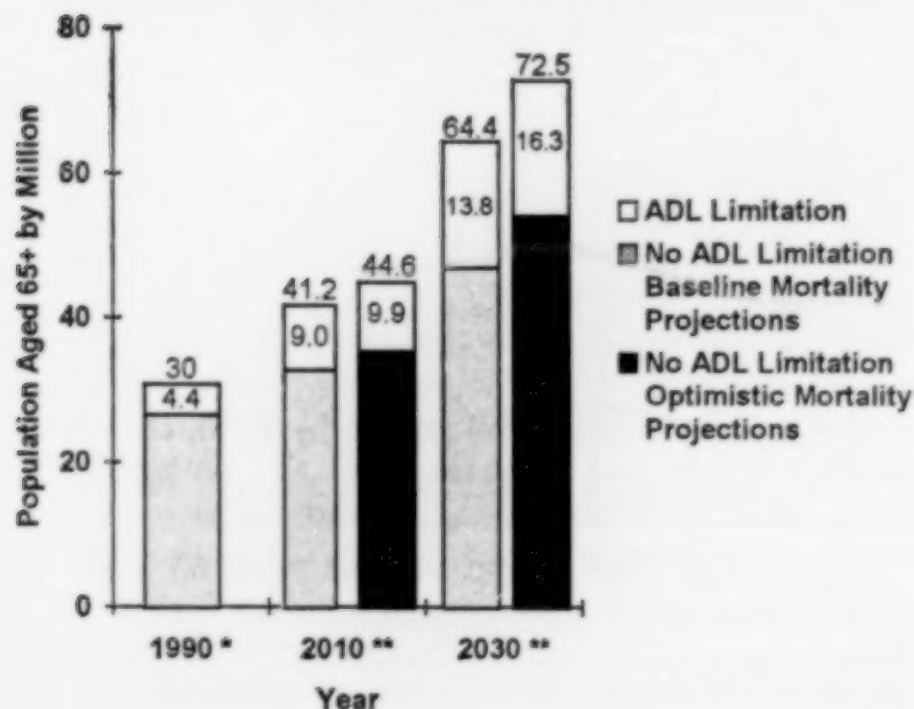
In addition to the economic advantages board and care provides over institutional settings, population growth trends predict a wave of older persons with disabilities. The older population needing access to new forms of residential services is increasing dramatically. The number of persons aged 65 and older is growing more rapidly than any other segment of the population. By 1989, one in eight persons was at least aged 65. *Aging America: Trends and Projections*, *supra*, at 2. By the year 2030, there will be proportionately more older persons than younger persons in the population—22 percent of the population will be aged 65 and older, while 21 percent will be under age 18. *Id.* at 8. Using conservative projections (hereinafter baseline projections),¹³ the population aged 65 and older will grow from 32 million in 1990 to 41 million in 2010, an increase of nearly one-third in a 20-year span. Sheila R. Zedlewski et al., *The Needs of the Elderly in the 21st Century* II-7 (1989). The population is expected to reach 64 million by 2030, representing another 57 percent increase from the projected 2010 level. *Id.*

More importantly, those persons aged 65 and older with limitations in the activities of daily living will increase dramatically. In 1990, approximately 4.4 million persons of all those aged 65 and older had one or more limitations in the activities of daily living. *Aging America: Trends and Projections*, *supra*, at 144. By 2010, according to the Urban Institute's study, the number of persons aged 65 and older with ADL limitations will rise to 9.0 million under the baseline mortality scenario or to

¹³ The Urban Institute study cited herein as *The Needs of the Elderly in the 21st Century* at II-7 (1989) makes population growth projections based on two different assumptions about future mortality. The first is that the decline in death rates will slow to half its historical pace, and the second, more optimistic mortality assumption, is that the death rate will continue to decrease at its historical pace—a decline of 1.2 percent per year. *Id.* at ii. Using the first assumption therefore produces lower estimates of population growth which this brief refers to as the baseline projections.

9.9 million under the optimistic scenario. Zedlewski et al., *supra*, at II-34, Table 2.10. By 2030, the projections are 13.8 million persons (baseline) and 16.3 million persons (optimistic). *Id.*¹⁴ These projections are illustrated in the following chart.

PROJECTED GROWTH IN POPULATION AGED 65+ WITH ADL LIMITATIONS



* *Aging America: Trends & Projections* at 144-45

** Zedlewski, *supra*, at II-7, II-34, Table 2.10

¹⁴ The Urban Institute study projects that there will be between 8.7 (baseline) and 12 million (optimistic mortality) frail elderly (85 years and older) in 2030, compared with 2.5 million in 1984. Thus, in 2030 the population of frail elderly persons is expected to be 4.8 times the size of the same population in 1984, thereby greatly increasing the demand for community support services. *Id.* at ii-iii. The number of elderly persons at risk for long-term care services in 2010 is projected at between 9.1 (baseline) and 10.1 million persons (optimistic mortality), and likely will grow to between 13.8 (baseline) and 16.7 million persons (optimistic mortality) by 2030. *Id.* at vi.

The recent Urban Institute study starkly describes the rapidly changing face of the aging American population. By analyzing projected mortality rates, the anticipated prevalence of disability and consequent changes in living arrangements, and changes in income, the Institute report concluded that "the increase in demand for supportive services is likely to be greater than many realize because future increases in the number of frail elderly, elderly with health limitations, and elderly living alone will all exceed the general increase in the elderly population" and these factors will "be the major determinants of the future needs of the elderly." *Id.* at Abstract.

But growth in numbers is only one part of the picture. Social changes exacerbate the problem. "[A] much larger proportion of the elderly is likely to be living alone, and a larger proportion is likely to have some level of health dependency." *Id.* at II-42. Thus, when the health of older persons living alone deteriorates, there will be no family members to care for them. Even with additional in-home supportive services, there is likely to be a surge in the need for long-term care facilities of one kind or another. *Id.*¹⁵ The statistics are staggering:

Under the baseline projection assumptions, the number who will require some long-term care services rises to 9.2 million in 2010 and to 14.1 million in 2030. Thus, more than one in five elderly persons will require some services in 2010 and 2030 (the total number of elderly will be 41.2 million 2010, and 64.4 in 2030 . . .). Moreover, the number of elderly in institutions will rise to 3.0 million in 2010 and 4.3 million in 2030—an increase of 139 percent

¹⁵ "Using the criteria that an elderly person living in the community with 2 or more limitations in incidental activities of daily living (IADLs) or 1 or more limitations in activities of daily living (ADLs) needs some formal, in-home services, these projections show that the demand for these services will rise dramatically—from 5.9 million elderly persons in 1990, to as many as 8.8 million elderly in 2010, and 14.7 million elderly in 2030." *Id.* at ix.

over the 1990 projection. . . . [T]he number of elderly persons doubles during the same period. Thus, the need for long-term care services will increase faster than the size of the elderly population between 1990 and 2030, if the baseline mortality and health assumptions are correct.

Id. at IV-9. If the mortality rates do improve at historical levels and disability rates do not decrease, "16.7 million elderly will need long-term care services in 2030." *Id.* By either measure, there will be a population bulge of unprecedented dimensions. Some of these persons will need total care but numerous others will need less intensive assistance, the type of assistance provided in community-based group living arrangements.

CONCLUSION

The growth of the board and care industry demonstrates that, if given the opportunity, the housing market will respond to the projected growth of older persons with disabilities with a range of housing opportunities. The need exists now, and surely will increase. Free choice in housing will have little meaning to older persons with disabilities if restrictive zoning ordinances are used to prevent providers from opening new homes. The FHAA was designed to ensure the inclusion of all persons with disabilities into full community life by affording them equal housing choices and should be construed in light of that broad remedial goal.

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

STEVEN S. ZALEZNICK
MICHAEL SCHUSTER
BRUCE B. VIGNERY *
DOROTHY M. SIEMON
DEBORAH M. ZUCKERMAN
AMERICAN ASSOCIATION OF
RETIRED PERSONS
601 E Street, N.W.
Washington, D.C. 20049
(202) 434-2120

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* Counsel of Record

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE
COUNCIL, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL FAIR HOUSING ALLIANCE AS
AMICUS CURIAE IN SUPPORT OF RESPONDENTS

THEODORE C. HESTER
ROBERT A. LONG, JR.*
CHRISTINA T. UELAND
CIVIL RIGHTS & BUILDING
1201 Pennsylvania Ave., N.W.
P.O. Box 7750
Washington, D.C. 20044
(202) 462-4400

* Counsel for Respondents

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether a municipality's definition of a "family" in a single-family zoning ordinance is a restriction on "the maximum number of occupants" exempted from the requirements of the Fair Housing Amendments Act, even though a single-family zoning ordinance is a use requirement with a distinct history and purpose from the occupancy restrictions denoted by the plain language and history of the Act.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE
COUNCIL, ET AL.,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL FAIR HOUSING ALLIANCE AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The National Fair Housing Alliance ("NFHA") is a nonprofit corporation that represents over sixty private, non-profit fair housing councils or centers throughout the United States. The NFHA seeks to identify and eliminate practices that constitute barriers to equal access to housing for all classes of persons

protected under the Fair Housing Act, including persons with disabilities, by researching the nature and effects of housing discrimination and acting as an advocate for effective programs of fair housing enforcement and compliance. Efforts to secure housing for persons with disabilities often face community opposition, based on unfounded fears and negative attitudes about such individuals. The NFHA provides advice to members who are facing opposition to the location of group homes, and has made many referrals to the Department of Justice regarding actions taken by municipalities and local planning commissions to prohibit or restrict housing for persons with disabilities. Accordingly, the issue presented in this case — the scope of the exemption from the Fair Housing Act for reasonable occupancy standards — is one of great importance to NFHA and its members.

SUMMARY OF ARGUMENT

Zoning ordinances and housing codes developed as distinct responses to different problems of population growth. As a result, they are both historically and substantively different. In this case, the Court must determine whether a single-family zoning ordinance is exempt from the Fair Housing Amendments Act as a "reasonable restrictio[n]" on the "maximum number of occupants." 42 U.S.C. § 3607(b)(1) (1988). An historical perspective shows that zoning ordinances are entirely distinct from the occupancy standards contemplated by the statutory exemption.

1. The explosion of immigration a century ago created unprecedented urban problems. Zoning emerged as a means of easing these pressures by separating incompatible uses. It also became a tool for communities — particularly suburban ones — to exclude uses and groups they deemed undesirable. For decades, communities used zoning to exclude minorities. More recently, they have used zoning to exclude the disabled. Courts and legislatures have consistently sought to counter these improper uses of the zoning laws. Pp. 5 to 17.

2. Housing codes, which typically include occupancy restrictions, have a different origin, in tenement house reform. They are aimed at protecting the health and safety of the inhabitants of buildings, rather than separating different uses of buildings or land. Federal funds offered to spur urban redevelopment led cities and towns nationwide to adopt housing codes that ordinarily included occupancy restrictions. Pp. 17 to 21.

3. Zoning's basic tool is exclusion or separation, and its hallmark is the "use restriction." Occupancy codes focus on the objective relationship between the size of a dwelling and the number of occupants it can accommodate. Thus, zoning codes are far more susceptible to discriminatory purposes or enforcement that are housing codes; and zoning codes have historically been used to discriminate against groups a community wants to exclude, in ways that housing codes and occupancy standards have not. Pp. 22 to 24.

4. The Fair Housing Amendments Act protects the disabled and other groups against discrimination in housing, subject to an exemption for reasonable occupancy restrictions. The plain language of the statutory exemption, particularly when read in light of the longstanding distinction between zoning laws and occupancy restrictions, does not apply to use restrictions such as the zoning ordinance at issue here. The Act's remedial purpose and legislative history confirm this conclusion. Pp. 25 to 29.

ARGUMENT

This case presents the Court with a straightforward issue of statutory interpretation. The City of Edmonds contends that it is entitled to exclude a group home for individuals who qualify as handicapped under the Fair Housing Amendments Act of 1988 ("FHAA") from a neighborhood zoned for single-family use, on the ground that the City's definition of "family" in its single-family zoning ordinance, ECDC § 21.30.010 (J.A. 250), is a "reasonable . . . restrictio[n]" regarding the maximum number of occupants

permitted to occupy a dwelling" that is exempt from the requirements of the FHAA, 42 U.S.C. § 3607(b)(1) (1988). The Ninth Circuit has held that Edmonds' single-family definition is not a maximum occupancy restriction and is subject to the FHAA. *City of Edmonds v. Washington State Bldg. Code Council*, 18 F.3d 802 (9th Cir. 1994). The Eleventh Circuit reached the contrary conclusion in an earlier case. *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir. 1992).

In determining what the "plain language" of a statute means, the Court looks not only to the meaning of the words in ordinary usage but also to what meaning is "most compatible with the surrounding body of law into which the provision must be integrated." *Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring). This is so because "[s]tatutory construction 'is a holistic endeavor' . . . and, at a minimum, must account for a statute's full text, language as well as punctuation, structure, and subject matter." *United States Nat'l Bank v. Indep. Ins. Agents of America, Inc.*, 113 S. Ct. 2173, 2182 (1993) (quoting *United Savings Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371 (1988)); see also *id.* at 2182 ("Over and over we have stressed that '[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849))).

Amicus NFHA will show that the Edmonds zoning ordinance has a distinct history and purpose from the "occupancy restrictions" contemplated by the FHAA's exemption: occupancy restrictions are addressed to concerns for the health and safety of people where they live, and are thus qualitatively different from zoning laws, which address concerns of separating land uses or deciding who may live where. The Ninth Circuit's interpretation — which recognizes that zoning laws and occupancy restrictions are two distinct modes of regulation, and which properly takes into account the "object and

policy" of the FHAA — is the only sensible reading of the statutory exemption.

I. ZONING FOR SINGLE-FAMILY USE IS A PREVALENT MEANS OF LAND USE PLANNING THAT, ALTHOUGH A USEFUL AND LEGITIMATE TOOL, HAS A RECOGNIZED HISTORY AS A MEANS OF EXCLUDING "UNDESIRABLE" GROUPS.

A. Zoning Arose as a Means For Municipalities To Separate Disparate Uses, In Response to Unprecedented Population Pressures.

A century ago, the Nation's cities were growing at an unprecedented pace. The urban population of the United States grew sevenfold from 1860 to 1910, while the rural population grew only twofold. Chicago's population doubled between 1880 and 1890 alone. See R. Hofstadter, *The Age of Reform* 173 (1955). As cities burst their seams, early zoning efforts in the United States tried to relieve the mounting pressure. These efforts focused on separating incompatible uses, such as removing noxious industries from residential areas.^{1/} For example, this Court in 1915 upheld an ordinance prohibiting a livery stable in a particular area, see *Reinman v. Little Rock*, 237 U.S. 171 (1915), and another that barred the operation of a brickyard or brick kiln within certain parts of Los Angeles, *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). Early attempts to go beyond this sort of "nuisance control," such as restrictions of commercial activity in residential areas, were generally held invalid as interferences with lawful uses of land. See N. Williams Jr. & J. Taylor, 1 *American Land Planning Law* § 5.02 (1988 rev. ed.).

^{1/} Indeed, American colonies began to control the location of industries likely to create nuisances as early as the 1690s. See 8 E. McQuillan, *Municipal Corporations* § 25.03, at 11 (3d rev'd ed. 1991).

The reluctance of the courts to permit zoned uses of land, however, did not alter the fundamental problem — and cities needed solutions. Following European examples,^{2/} New York City forged ahead, passing the nation's first comprehensive zoning plan in 1916. Its zoning ordinance survived challenge in the courts of that state four years later, as "a proper exercise of the police power." *Lincoln Trust Co. v. Williams Bldg. Corp.*, 229 N.Y. 313, 317, 128 N.E. 209, 210 (1920). When Baltimore tried to follow suit, on the other hand, the high court of Maryland struck down its ordinance. *Goldman v. Crowther*, 147 Md. 282, 128 A. 50 (1925).

The question came before this Court only a few years later in *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). In 1903, Euclid was a newly incorporated agricultural village on the outskirts of Cleveland; scarcely two decades later, Euclid saw the need to

^{2/} European cities had been subject to comprehensive planning long before American cities. American planners were particularly influenced by the German experience; beginning early in the nineteenth century, Prussian initiatives in city building had, by the turn of that century, created exemplars of zoning and planning. S. Toll, *Zoned American* 125-40 (1968). One influential early commentator on zoning believed that the German model was followed without due consideration for the differences between Germany and the United States. Ernest Freund, author of *The Police Power* (1904), was in a position to know; educated in Germany, he immigrated to this country and became a professor of law at the University of Chicago in the field of public law. He felt that "in Germany property is conservative, and in this country it is not. Therefore, the districting power in Germany means that it simply registers conditions that are more or less permanent; in this country, it would mean that the city would impose a character upon a neighborhood which that neighborhood, in the course of time, would throw off." S. Toll, *supra*, at 138 (quoting E. Freund, *Proceedings of the Third National Conference on City Planning* 245 (1911)). Other planners rejected Freund's conclusion that cities should not be given the power to control development as too capricious to foresee; they believed that rapid change made zoning powers all the more urgent. *Id.* at 139. At the core of this debate lies an insight about zoning in the American tradition: it is a bulwark against change, and a tool to keep out unwanted influences.

defend itself against the advancing city. See S. Toll, *supra*, at 214-16. It did so by zoning. As the landowner challenging the zoning plan saw it, the ordinance "[i]n effect . . . erects a dam to hold back the flood of industrial development and thus to preserve a rural character in portions of the Village which, under the operation of natural economic laws, would be devoted most profitably to industrial undertakings." *Euclid*, 272 U.S. at 371.

This Court upheld the ordinance as a valid exercise of the police power. Noting that "[t]he constantly increasing density of our urban populations, the multiplying forms of industry and the growing complexity of our civilization make it necessary for the State . . . to limit individual activities to a greater extent than formerly," *id.* at 392 (quoting *City of Aurora v. Burns*, 319 Ill. 84, 93 (1925)), the Court concluded that the advantages of separating residential, business, and industrial uses gave the ordinance a substantial relation to the public health, safety, morals, and general welfare, *id.* at 394-95. The Court illustrated its reasoning with the example of an apartment building in a neighborhood of detached houses:

[I]n such sections very often the apartment house is a mere parasite, constructed in order to take advantage of the open spaces and attractive surrounding created by the residential character of the district. Moreover, the coming of one apartment house is followed by others, interfering by their height and bulk with the free circulation of air and monopolizing the rays of the sun which otherwise would fall upon the smaller homes, and bringing, as their necessary accompaniments, the disturbing noises incident to increased traffic and business, and the occupation, by means of moving and parked automobiles, of larger portions of the streets, thus detracting from their safety and depriving children of the privilege of quiet and open spaces for play, enjoyed by those in more favored localities,—until, finally, the residential character of the

neighborhood and its desirability as a place of detached residences are utterly destroyed.

Id. at 394. The Village of Euclid, then, was free to protect itself against such encroachments from the outside.

The *Euclid* decision was a clarion call for evolving suburban communities across the country. Despite the efforts of cities to combat the problems of immigration, many of their citizens solved the problem more simply: by moving to the suburbs. The suburbs themselves were something of a new phenomenon, made possible by short-haul passenger rail and the automobile. See K. Jackson, *Crabgrass Frontier: The Suburbanization of the United States* 91-92 (1985); S. Toll, *supra*, at 190-94; S.B. Warner, Jr., *Streetcar Suburbs* 14 (1978). As one commentator put it, *Euclid* "cleared the way for similarly sited communities to limit population and ward off the evils of urbanization Zoning out, or segregating, the city's most distasteful uses could help ensure that the escape to the suburbs would not mean facing again the problems left behind." M.A. Wolf, *The Prescience and Centrality of Euclid v. Ambler*, in *Zoning and the American Dream* 252, 261-62 (C. Haar & J. Kayden eds., 1989).

Today, almost all American cities (with the renowned exception of Houston), incorporated towns, and many smaller communities have zoning ordinances of some kind. 8 McQuillin, *Municipal Corporations*, § 25.04 at 13 (3d rev'd ed. 1991); 1 N. Williams, *supra*, § 16.01 at 434. Single-family districts — which comprise most or all of the residential and vacant areas in many communities — are a prominent feature of such ordinances. See 1 N. Williams, *supra*, § 16.14 at 441. While there do not appear to be nationwide statistics on the percentage of the nation's housing stock zoned for single-family use, the 1990 Census reports that 59% of housing units in the United States are detached single-family houses. Bureau of the Census, U.S. Dep't of Commerce, *1990 Census of Housing: General Housing Characteristics: United States*, Table 15, at 19 (1992). Many of them — like the City of Edmonds — describe

their zoning plans as "Euclidian." See Petitioners' Brief on the Merits at 8.

B. Zoning Was Also Used To Exclude "Undesirable" Groups, Such as Racial and Ethnic Minorities, From New Suburban Communities.

The urge to escape the "distasteful" aspects of city life was not a wholly benign response to a completely objective problem. The character of the city's new population was an issue as well. Southern and Eastern Europe supplied much of the vast flood of immigration in the last decades of the nineteenth century and the first decades of this one, and the new immigrants — linguistically, ethnically, and religiously unlike more established inhabitants — were not warmly welcomed. Wolf, *supra*, at 255-56. Henry James expressed a common view of one such group of immigrants, in New York:

[I]t was the sense, after all, of a great swarming, a swarming that had begun to thicken, infinitely, as soon as we had crossed to the East side and long before we had got to Rutgers Street. There is no swarming like that of Israel when once Israel has got a start, and the scene here bristled, at every step, with the signs and sounds, immitigable, unmistakable, of a Jewry that had burst all bounds.

H. James, *The American Scene* 131 (1968). At the same time, Southern blacks began to migrate from tenant farms to Northern cities. White commuting to the suburbs rose. K. Jackson, *supra*, at 150 (1985).

Indeed, zoning was often used directly to regulate which races should live where. See generally 2 Williams, *supra*, ch. 59. In a particularly egregious example, San Francisco in 1890 passed an ordinance requiring all Chinese to move from their homes (generally, within what is now Chinatown) to a different designated

area within the city, or out of the city entirely. An American of Chinese descent challenged the ordinance under the Constitution and a U.S.-China treaty. A federal district judge put his holding in no uncertain terms: "The discrimination against Chinese . . . in violation of the constitutional, treaty, and statutory provisions cited, are so manifest upon its face, that I am unable to comprehend how this discrimination and inequality of operation, and the consequent violation of the express provisions of the constitution, treaties and statutes of the United States, can fail to be apparent to the mind of every intelligent person, be he lawyer or layman." *In re Lee Sing*, 43 F. 359, 360 (C.C.D. Cal. 1890).

Elsewhere in the country, zoning directed against African Americans was not always perceived so clearly. While a North Carolina court held a racial zoning ordinance invalid as a revolutionary public policy that would require full legislative consideration, *see State v. Darnell*, 166 N.C. 300, 81 S.E. 338 (1914), such ordinances — carefully drafted to be, on their face, equally burdensome to whites and blacks — were upheld elsewhere. *See, e.g., State v. Gurry*, 121 Md. 534, 88 A. 228 (1913); *Harris v. City of Louisville*, 165 Ky. 559, 177 S.W. 472 (1915). Reversing *Harris v. City of Louisville*, this Court made clear that racial zoning was intolerable. *Buchanan v. Warley*, 245 U.S. 60 (1917).

More subtle approaches followed. As this Court and others insisted that subterfuges were fully as impermissible as openly zoning for race, *see, e.g., Tyler v. Harmon*, 158 La. 439, 104 So. 200 (1925), 160 La. 943, 107 So. 704 (1926), *rev'd per curiam*, 273 U.S. 668 (1927),^{3/} segregation in housing was maintained

^{3/} Cities nevertheless attempted to enact various racial zoning ordinances through the next quarter-century. The last major case on direct racial zoning arose from a Birmingham, Alabama, ordinance that zoned 16% of the city for occupancy by Negroes, who then constituted about 40% of the city's residents. *See Monk v. City of Birmingham*, 87 F. Supp. 538 (D. (continued...)

through private devices, such as racially restrictive covenants. *See* 2 N. Williams, *supra*, at § 59.06. In time, racially restrictive covenants were also struck down. *Shelley v. Kraemer*, 334 U.S. 1 (1948).^{4/}

As more obvious approaches to racial zoning have been invalidated, however, localities have found that "any land use controls which limit housing to more expensive housing types may be an efficient means of keeping out members of . . . minorities The variety of land use policies and devices which are adaptable for this purpose is almost infinite." 2 N. Williams, *supra*, § 59.06 at 750; *see also* D. Mandelker, *Land Use Law* § 7.01 at 317 (3d ed. 1993) ("Exclusionary suburban zoning is a well-known and notorious phenomenon. Suburban municipalities exclude multi-family developments, require low residential densities, and adopt other exclusionary restrictions This type of zoning excludes low- and moderate-income groups.")

Against this background, Congress passed the Fair Housing Act in 1968 ("FHA"). There, Congress sought to combat the problem of racial segregation in housing on all fronts: state policies, municipal ordinances, and private practices alike. 42 U.S.C. §§ 3601-3619 (1988); R. Schwemm, *Housing Discrimination: Law and Litigation* at 1-1 (1994) (the passage of the FHA marked the first time that "legal tools became available to attack all forms of

^{3/}(...continued)

Ala. 1949), *aff'd*, 185 F.2d 859 (5th Cir. 1950), *cert. denied*, 341 U.S. 940 (1951).

^{4/} Like the racial-zoning decisions, the holding in *Shelley* did not meet with immediate acquiescence. The State of California attempted to amend its constitution to forbid any restriction on the rights of real-property owners to refuse to sell, lease, or rent their property to any other. Affirming the Supreme Court of California, this Court invalidated the provision under the equal protection clause of the Fourteenth Amendment. *Mulkey v. Reitman*, 413 P.2d 825 (Cal. 1966), *aff'd*, 387 U.S. 369 (1967).

housing discrimination"). But local governments have continued to use the zoning power to maintain racial segregation. R. Schwemm, *supra*, § 13.4(3)(a) at 13-24.1; *see also* Note, *Developments in the Law—Zoning*, 91 Harv. L. Rev. 1427, 1624-1708 (1978). For example, a common means by which communities have made "housing . . . 'unavailable' in violation of [the Fair Housing Act] is [by using] their zoning or other land-use powers to block construction of housing projects that are likely to include racial minorities or other classes protected by Title VIII." R. Schwemm, *supra*, § 13.5(3)(a) at 13-24.1.

Under the Fair Housing Act, courts have recognized and refused to condone such abuses of the zoning power. *See, e.g., United States v. Yonkers Bd. of Educ.*, 837 F.2d 1181, 1216-26 (2d Cir. 1987), *cert. denied*, 486 U.S. 1055 (1988); *Arthur v. City of Toledo*, 782 F.2d 565, 575 n.3 (6th Cir. 1986); *Atkins v. Robinson*, 733 F.2d 318, 321 (4th Cir. 1984); *United States v. City of Birmingham*, 727 F.2d 560, 563, 65 (6th Cir.), *cert. denied*, 469 U.S. 821 (1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1065-67 (4th Cir. 1982). Indeed, courts have overturned exclusionary zoning practices even where there is no proven discriminatory intent — but where the zoning practices would have a disproportionate impact on a protected class and are not supported by a substantial justification. *See, e.g., Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 937 (2d Cir.) ("Though a town's interests in zoning requirements are substantial, they cannot, consistently with Title VIII, automatically outweigh significant disparate effects.") (citations omitted), *aff'd per curiam*, 488 U.S. 15 (1988).

C. Single-Family Zoning Has a Long and Well-Recognized History as a Means of Excluding Disabled People Who Require Congregate Living Arrangements.

The FHA focused on discrimination against racial, ethnic, and religious minorities. Members of these groups, however, were not the only Americans who found themselves locked out of certain

communities in their own country. As the deinstitutionalization movement^{2/} struggled to integrate disabled people into communities, frightened neighbors sought to shut them out. *See* G. Tuoni, *Deinstitutionalization and Community Resistance by Zoning Restrictions*, 66 Mass. L. Rev. 125 (1981). The favorite tool of exclusion was, once again, zoning. *See id.*; P. Rohan, 1 *Zoning and Land Use Controls* at § 3.05[7][a][i] (1994) ("Progress towards normalization for various types of people dependent upon society has sometimes been impeded by local zoning regulations that exclude group homes from residential areas.").

While some communities have employed techniques aimed directly at excluding or limiting group homes, such as bans in certain areas or stringent requirements for conditional use permits, communities have most commonly sought to exclude group homes from residential districts through restrictive definitions of the word "family." 1 Rohan, *supra*; *see also id.* n.206 (citing state court cases concerning the application of restrictive definitions of "family" to various facilities); 8 McQuillin, *supra*, at § 25.128.15. "Typically, the local zoning ordinance will designate certain areas of the municipality as 'single family residential' zones either expressly prohibiting group homes or imposing burdensome special conditions upon such uses. The exclusionary nature of these zones is often premised upon restrictive definitions of 'family' which limit occupancy in such zones to persons related by blood, marriage or adoption." L. Steinman, *The Impact of Zoning on Group Homes for the Mentally Disabled: A National Survey*, 19 *The Urban Lawyer* 1, 2 (1987).

^{2/} The "deinstitutionalization movement" began in response to research showing that many people with mental and other disabilities are ill-served by institutions, and are more likely to achieve productive lives and therapeutic success when they live in the wider community. *See generally* Brief of the American Association on Mental Retardation, *et al.*, as Amici Curiae in Support of Respondents [hereinafter Brief of the AAMR].

Another commentator has remarked: "In states where statutes do not totally pre-empt municipalities from regulating community residences, municipalities have enacted ordinances that have the effect of excluding some community residences from areas zoned for single family use. These ordinances accomplish that purpose by using a restrictive definition of the term 'family' for zoning purposes." R. Schonfeld, *"Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded*, 16 Fordham Urb. L.J. 1, 14 (1988) [hereinafter Schonfeld, *Unconstitutional Challenges*]. See also Note, *Group Homes and Deinstitutionalization: The Legislative Response to Exclusionary Zoning*, 6 Vt. L. Rev. 509, 509-510 (1981) (single-family zoning, "which has become known as exclusionary zoning, is the barrier group homes most frequently confront").

Although these ploys were taking place at the local level, they did not escape federal attention. In 1983, a few years before the passage of the FHAA, a General Accounting Office review identified single-family zoning as a serious obstacle to establishing group homes for the mentally disabled. See General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes For the Mentally Disabled* (Aug. 17, 1983). That review illustrated how zoning requirements can prevent or add unnecessary costs to the establishment of such homes. In one example, the sponsor of a group home near Odessa, Texas, reported that he had located the home outside the city limits because of the restrictive definition of "family" found in the city's zoning ordinance. *Id.* at 14. The survey also reported the comment of the Texas Association for Retarded Citizens that "zoning and land-use restrictions in Texas forced group homes to locate outside city limits, away from the community, transportation, jobs, or services, or cluster in areas that could be called 'mentally disabled districts,'" and that these restrictions operated to limit "integration of the mentally disabled into the community." *Id.* at 15.

State courts and legislatures recognized and acted upon the need for community residences for the disabled, and the intense local resistance to such residences, well before Congress did. In 1978, New York's legislature found neighborhood opposition to establishment of community residences for the mentally disabled so severe that it enacted a statute to redress the problem. Among other measures, the statute limits the participation of municipalities in selecting sites for community residences, and expressly declares that residences established according to its terms are "single-family residences" for local zoning purposes. See 1990 N.Y. Laws ch. 468 § 2; see also generally R. Schonfeld, *"Not in My Neighborhood": Legal Challenges to the Establishment of Community Residences for the Mentally Disabled in New York State*, 13 Fordham Urb. L. J. 281 (1985) (discussing statute's impact on the establishment of group homes). Before the statute was passed, a number of New York courts had already declared that group residences that functionally resembled families qualified for inclusion in "single-family" zones. See, e.g., *Little Neck Community Ass'n v. Working Org. for Retarded Children*, 52 A.D.2d 90, 383 N.Y.S.2d 364 (2d Dep't 1976), *leave to appeal denied*, 40 N.Y.2d 803, 356 N.E.2d 482, 387 N.Y.S.2d 1030 (1988); *Incorporated Village of Freeport v. Association for the Help of Retarded Children*, 94 Misc. 2d 1048, 406 N.Y.S.2d 221 (1977), *aff'd*, 60 A.D.2d 644, 400 N.Y.S.2d 724 (2d Dep't 1977). But cf. *People v. Renaissance Project, Inc.* 36 N.Y.2d 65, 364 N.Y.S.2d 885, 324 N.E.2d 355 (1975) (holding that a half-way house connected with a narcotics rehabilitation program violated a zoning ordinance prohibiting more than five unrelated individuals from maintaining a single housekeeping unit in a single-family residential zone). Both New York's courts and its legislature, then, expressly recognized and responded to the use of single-family zoning ordinances as a means of excluding disabled people in need of congregate living arrangements.

By 1988, the year that the FHAA was passed into law, many state legislatures had enacted statutes to govern the establishment of community residences for the mentally disabled, and most of those

statutes expressly provided that such residences could be placed in areas zoned for single-family use. See R. Schonfeld, *Unconstitutional Challenges*, *supra*, at 10-11 (citing state statutes).^{6/} As of 1994, thirty-four states had passed legislation limiting or preventing the use of zoning or restrictive covenants to exclude community group homes.^{7/} These statutes have differing scopes and restrict municipalities in varying ways; for example, many provide protection to group homes for the mentally disabled

^{6/} At the same time, however, many of these statutes place restrictions on group homes, including limitations on the number of occupants who may live in them. See *id.* at 11-15.

^{7/} See Ariz. Rev. Stat. Ann. §§ 36-581, 36-582 (1986); Cal. Welf. & Inst. Code §§ 5115-5117 (West 1985); Colo. Rev. Stat. Ann. §§ 30-28-115, 31-23-303 (1977 & Supp. 1985); Con. Gen. Stat. Ann. § 8-3e (West Supp. 1986); Del. Code Ann. tit. 9, § 4923 (Supp. 1984); Fla. Stat. Ann. § 163.3177(6)(f) (West Supp. 1986); Hawaii: Act Relating to Domiciliary Care, No. 272, 1985 Hawaii Sess. Laws 575; Idaho Code §§ 67-6530 to 6532 (1980); Ind. Code Ann. §§ 16-13-21 to 22 (Burns Supp. 1985); Iowa Code Ann. §§ 358A.25, 414.22 (West Supp. 1986); La. Rev. Stat. Ann. §§ 28:475 to 478 (West Supp. 1986); Me. Rev. Stat. Ann. tit. 30, § 4962-A (Supp. 1985); Md. Health-Gen. Code Ann. §§ 7-101 to 414 (1982 & Supp. 1985); Mich. Comp. Laws Ann. §§ 125.216a, 125.286a, 126.583b (West Supp. 1985); Minn. Stat. Ann. §§ 245.812, 462.357 (West Supp. 1986); 1985 Mo. Laws 398; Mont. Code §§ 76-2-401 to 412 (1985); Neb. Rev. Stat. §§ 18-1744 to 1747 (1983); Nev. Rev. Stat. § 278.021 (1983); N.J. Stat. Ann. §§ 40:55D-66.1 to 66.2 (West Supp. 1986); N.M. Stat. Ann. § 3-21-1(c) (1985); N.Y. Mental Hygiene Law § 41.34 (McKinney Supp. 1986); N.C. Gen. Stat. § 168-21 to 23 (1982 & Supp. 1985); N.D. Cent. Code § 25-16-14(2) (Supp. 1985); Ohio Rev. Code Ann. § 5123.19 (Page Supp. 1985); Or. Rev. Stat. §§ 418.950 to .970, 443.205 to 225, 443.580 to .600 (1985); R.I. Gen. Laws §§ 34-4-25, 45-24-22 to 23 (1980 & Supp. 1985); S.C. Code Ann. §§ 6-7-830, 44-7-510, 44-21-525 (Law Co-op & Supp. 1984); Tenn. Code Ann. §§ 13-24-101 to 104 (1980); 1985 Tex. Sess. Law Serv. ch. 303 (Vernon); Utah Code Ann. §§ 10-9-2.5, 17-27-11.7 (Supp. 1985); Vt. Stat. Ann. tit. 24, § 4409(d) (Supp. 1985); Va. Code § 15.1-486.2 (1981 & Supp. 1986); W. Va. Code §§ 8-24-50b(a), 27-17-1 to 4 (Supp. 1985); Wis. Stat. Ann §§ 46.03(22), 59.97(15) (West 1979 & Supp. 1985).

but do not apply to self-governing homes for recovering alcoholics, such as the Oxford House. See 1 Rohan, *supra*, § 3.05[7] at 3-352 to 3-355 & nn. 230-239 (discussing differences among various state statutes of this kind). See generally Hopperton, *State Legislative Strategy for Ending Exclusionary Zoning of Community Homes*, 19 Urban L. Ann. 47 (1980).

This Court has previously recognized that zoning ordinances can be impermissibly deployed as a tool to exclude the disabled from a given community. In *City of Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432 (1985), the Court invalidated under the Equal Protection Clause a municipal zoning ordinance prohibiting group homes for the mentally retarded while allowing other similar homes. It held that the difference in treatment between the two similar classes of homes was not rationally related to any legitimate municipal purposes. It recognized that community opposition to such homes was based on negative attitudes and unsubstantiated fears, and held that such biases could not justify the ordinance. *Id.* at 448-50. While the Court distinguished single-family zoning ordinances on the ground that they are at least facially neutral, *id.* at 439 n.8, *Cleburne* demonstrates that zoning ordinances are a well-known means by which communities may try to exclude group homes that they deem undesirable.

II. PROVISIONS GOVERNING MAXIMUM NUMBERS OF OCCUPANTS DEVELOPED IN RESPONSE TO CONCERNS ABOUT THE HEALTH AND SAFETY OF THOSE ACTUALLY LIVING IN BUILDINGS RATHER THAN CONCERNS ABOUT WHO SHOULD LIVE IN A GIVEN COMMUNITY.

Occupancy codes emerged in response to a different consequence of the same ferocious urban growth that fueled the development of zoning laws. The cities fled by new suburbanites remained swollen with new immigrants; the condition of the slums

they lived in provoked a national outcry.^{8/} A New York legislative report of 1857 described contemporary tenements as scenes of

hideous squalor and deadly effluvia; the dim, undrained courts oozing with pollution; the dark, narrow stairways, decayed with age, reeking with filth, overrun with vermin; the rotted floors, ceilings begrimed, and often too low to permit you to stand upright; the windows stuffed with rags . . . the gaunt, shivering forms and wild ghastly faces, in these black and beetling abodes.

L. M. Friedman, *Government and Slum Housing: A Century of Frustration* 28 (1968); see also C.D. Wright, *The Slums of Baltimore, Chicago, New York, and Philadelphia*, House of Representatives, Executive Document No. 527, 7th Special Report of the U.S. Commissioner of Labor, 1894. Occupancy restrictions, along with other aspects of housing and building codes, were attempts to alleviate these appalling conditions.

Housing codes were not an entirely new development. The first housing codes in the United States attempted to reduce the risk of fire — for example, a 1766 law required all dwellings in certain densely populated areas to be made of stone or brick, and roofed with tile or slate. Another law of the same era prohibited the storage of hay, straw, pitch, tar and turpentine in populated areas susceptible to fire. See L. M. Friedman, *supra*, at 25. Other than such attempts to prevent fire, however, dwellings were not regulated except to control public nuisances. See Program for the Study of Corruption in Local Government, U.S. Dep't of Justice,

^{8/} The conditions of life in the tenements was a favorite topic of "muckraking" journalists and authors. Perhaps the finest example of such works on tenement life is Jacob Riis's classic *How the Other Half Lives* (1890). Riis himself came to this country in steerage as a penniless Danish carpenter, and became an influential and respected voice for social reform. See S. Toll, *supra*, at 21-22.

1 *Corruption in Land Use and Building Regulation: An Integrated Report of Conclusions* 13 (1979).

But the great nineteenth-century explosion of immigration to American cities made laissez-faire untenable. New York City, with its teeming tenements and recurrent epidemics of cholera, was the first to act. Its 1867 law governing tenement houses required them to meet minimum standards of health and safety; it obligated them to have fire escapes, ventilators, and adequate roofing; and it made some attempt to address overcrowding. Laws N.Y. 1867, ch. 908, reprinted in L. M. Friedman, *supra*, at 25. A number of other state and city governments followed suit. *Id.* at 26.

The tenement-house laws were no match for the slums, however. By 1901, conditions had, if anything, deteriorated. Again, New York acted first: it formed a Metropolitan Board of Health, and passed a new ordinance regulating tenement houses still more strictly. See L. M. Friedman, *supra*, at 34-36. That ordinance included provisions directly limiting the occupancy of tenement houses based on an objective relationship between the building's capacity and minimum human needs: "No room in any tenement house shall be so overcrowded that there shall be afforded less than four hundred cubic feet of air to each adult, and two hundred cubic feet of air to each child under twelve years of age" *Id.* at 34 (quoting Laws N.Y. 1901, ch. 334, § 112). This ordinance, aimed not restricting uses but at protecting occupants' health and safety, is the ancestor of today's occupancy codes.

The reforming impulse of the new century brought rapid development. Progressives called for more comprehensive, broader housing codes that would reach beyond tenement houses. See generally R. Lubove, *The Progressives and the Slums: Tenement House Reform in New York City 1890-1917* (1963). A pivotal figure was Lawrence Veiller, founder of the National Housing Association, who publicized the horrors of the slums and the cause of housing reform in books such as *Housing Reform* (1910), *A Model Tenement House Law* (1910), and *A Model Housing Law*

(1910). By 1920, eight states and twenty cities in other states had enacted comprehensive housing codes to deal with overcrowding and related problems, mostly modeled on the paradigms developed by Veiller and New York. L. M. Friedman, *supra*, at 39.

As housing codes developed, the problems of population pressures and overcrowding came to be understood as a social issue affecting entire communities. In 1937, for example, Pennsylvania passed a comprehensive Housing Authorities Act addressing a number of issues, including overcrowding:

In 1937, the Pennsylvania legislature found the existence of unsafe, unsanitary, inadequate or overcrowded dwellings, . . . [and] overcrowding . . . to be prejudicial to the welfare of the people because such conditions subject the moral standards of the people to bad influences which have permanent deleterious social affects, increase the violation of the criminal laws of the commonwealth and jeopardize the safety and well-being of the inhabitants, [and] necessitate the expenditure of vast sums of public money both by the commonwealth and local governmental bodies for the purpose of crime prevention, punishment and correction, fire and accident prevention, public health service and relief.

Preamble, 1937 Housing Authorities Act of Pennsylvania, *reprinted in* T. Gilhool, *Social Aspects of Housing Code Enforcement*, 3 Urban Lawyer 546, 546 (1971).

Housing codes became established nationwide through intervention of the federal government. The Housing Act of 1949, 63 Stat. 414, § 101(a) (1949), provided municipalities with funds for the redevelopment of urban areas, so long as they had implemented "positive programs . . . for preventing the spread or recurrence . . . of slums and blighted areas through the adoption, improvement, and modernization of local codes and regulations relating to land use and adequate standards of health, sanitation, and

safety for dwelling accommodations." By 1964, the conditions for federal funds had become still more stringent:

No workable program shall be certified . . . unless (a) the locality has had in effect . . . a minimum standards housing code, related but not limited to health, sanitation, and *occupancy requirements*, which is deemed adequate by the Secretary of the Department of Housing and Urban Development, and (b) the Secretary is satisfied that the locality is carrying out an effective program of enforcement to achieve compliance with such housing code.

78 Stat. 785 (1964) (emphasis added). The lure of federal funds brought housing codes, including occupancy standards, to most communities in the nation. L.M. Friedman, *supra*, at 49.

In the wake of increasing criticism regarding the federal government's role in housing code enforcement, during the 1980s the government eliminated or reduced many of the federal programs that had spurred nationwide adoption of housing codes. *See* J.B. Cullingworth, *The Political Culture of Planning* 169 (1993). State and local governments have stepped in where the federal government stepped out; for example, even before the cutback of federal programs, many states began taking a more active role in enforcing statewide housing codes. *See* S. Paratt, *Housing Code Administration and Enforcement* viii-xi (1970). The impact of housing codes — including occupancy requirements — has thus taken on an increasingly local character, *see id.*, but such codes remain in force in most communities. The essential point remains that such housing codes are addressed not to separating the uses of land in particular areas but instead to basic concerns of health and safety for those who inhabit certain buildings.

III. BECAUSE OF THEIR HISTORY AS A MEANS OF EXCLUDING UNDESIRED USES, ZONING CODES ARE MORE SUSCEPTIBLE TO ABUSE AS TOOLS OF DISCRIMINATION AGAINST "UNDESIRABLE" INDIVIDUALS THAN ARE MAXIMUM OCCUPANCY RESTRICTIONS.

While zoning and occupancy codes both evolved out of problems arising from the population explosion of the late 1800s, they have different purposes and address distinct issues: zoning laws are aimed at controlling land use and preventing the incursion of unwanted influences into particular areas; while occupancy requirements are addressed to the health and safety concerns of ensuring minimal standards of access to space and air. Reflecting this distinction, occupancy restrictions typically appear in housing or building codes rather than in zoning codes. See F. Schnidman, S. Abrams, J. Delaney, *Handling the Land Use Case* § 1.5.3, at 30-31 ("Housing codes set minimum standards for the occupancy of residential dwellings. Their purpose is to safeguard the health and safety of occupants.") (1984); 8 McQuillin, *supra*, § 25.10 at 38 (distinguishing zoning from building codes and tenement codes); R. Schwemm, *Housing Discrimination: Law and Litigation* § 11.6(2)(b) at 11-86 (1994). Indeed, Edmonds' own regulation of maximum occupancy is through its adoption of the Uniform Housing Code. ECDC 19.10.000 (J.A. 248); Uniform Housing Code § 503(b) (J.A. 180-81).

In contrast, the "use restriction" is the hallmark of zoning. As the Kentucky Court of Appeals has explained:

Although the noun "use" does not lend itself to the making of nice distinctions, we think that in one of its meanings it furnishes a basis for distinguishing between a zoning statute and a mere building code statute. Zoning has as one of its main purposes the regulation of the *use* of property. This means regulation of the purpose or the

object of the use, rather than the mere conditions or circumstances of the use.

American Sign Corp. v. Fowler, 276 S.W.2d 651, 654 (Ky. 1955) (emphasis in original, citation omitted); see also *Enos v. City of Brockton*, 236 N.E.2d 919 (Mass. 1968) (differentiating between zoning and building codes on the ground that zoning regulates use); 1 E.C. Yokley, *Zoning Law and Practice* § 1-3 at 4 (4th ed. 1978) ("zoning is almost exclusively concerned with use regulation"); 8 McQuillin, *supra*, § 25.17 at 61 ("Zoning seeks to promote the public health, safety, morality and welfare by confining certain classes of buildings and uses to defined areas."). Even in the time of *Euclid v. Ambler*, zoning was understood as a set of use restrictions with an exclusionary purpose. See 272 U.S. at 380-81, 388; see also M.A. Wolf, *supra*, at 254 ("Exclusion is the essence of Euclidean zoning.").

Sadly, as discussed above in Part I, the definition of what and who should be excluded has not always been legitimate. While zoning serves important purposes, "local land use restrictions may also serve a nonlegitimate purpose, or indeed sometimes no real purpose at all — that is, they may be exclusionary in intent and/or effect, or merely the product of a quite parochial vision, or sometimes unduly harsh with little compensating public benefit — or merely inept." 1 Williams, *supra*, § 5.05 at 111.

The discretionary nature of zoning enforcement also lends itself to illegitimate exclusion. Communities often rely on complaints from neighbors to enforce zoning codes; and, as in this case, neighbors complain when they feel that their new neighbors are "undesirable." In particular, group homes for disabled people are likely to be singled out for enforcement of zoning codes: "From the local government perspective . . . the community residence or group home in a residential area is an anathema. Residents fear that these homes will depress property values and destroy neighborhood tranquility." Steinman, *supra*, at 2; see also General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the*

Establishment of Group Homes for the Mentally Disabled App. 1 at 10 (Aug. 17, 1983) (listing concerns raised by neighbors of proposed group homes at public hearings).^{9/} It has long been established that facially neutral zoning codes can be enforced in a discriminatory and therefore improper manner. See, e.g., *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886); *State v. Vadnais*, 202 N.W.2d 657 (Minn. 1972); *Salt Lake County v. Kartchner*, 552 P.2d 136 (Utah 1976).

Occupancy codes, on the other hand, have not been subject to such criticism. Indeed, Justice Stevens, concurring in *Moore v. East Cleveland*, contrasted the potential for abuse inherent in "family"-based zoning codes with objective occupancy codes that do not depend on the family relationships of the occupants regulated. 431 U.S. 494, 521 & n.16 (1977). This is true, in part, simply because occupancy codes are inherently less malleable than use restrictions; they are defined in terms of numerical, objective criteria. More fundamentally, occupancy codes are not — as zoning codes are — based on principles of exclusion.

^{9/} The source of the illegitimate animosity is of no consequence. If public officials perform an official act "simply in order to appease the discriminatory viewpoints of private parties, that act itself becomes tainted with discriminatory intent even if the decisionmaker personally has no strong views on the matter." *Association of Relatives and Friends of AIDS Patients v. Regulations & Permits Admin.*, 740 F. Supp. 95, 104 (D.P.R. 1990).

IV. THE PLAIN LANGUAGE OF THE FAIR HOUSING AMENDMENT ACT, READ IN THE CONTEXT OF THE HISTORICALLY DISTINCT EVOLUTION OF ZONING LAWS AND OCCUPANCY REQUIREMENTS, ESTABLISHES THAT SINGLE-FAMILY ZONING CODES ARE NOT RESTRICTIONS ON THE "MAXIMUM NUMBER OF OCCUPANTS" WITHIN THE MEANING OF THE STATUTORY EXEMPTION.

The historical evolution of zoning laws and occupancy requirements set forth above establishes three fundamental propositions: (a) zoning laws evolved out of a desire to exclude uses and insulate communities from outside influences; (b) occupancy requirements developed along with other housing code principles out of the separate desire to ensure the health and safety of residents of any given city or community, rather than to control land use in any given area; and (c) zoning laws have been frequently misused for illegitimate or discriminatory purposes, while housing codes, including occupancy requirements, have not.

Viewed in the context of this historical background and the distinct evolution of occupancy requirements versus zoning laws, the language of the FHAA exemption can have only one meaning. The exemption for restrictions on "the maximum number of occupants" is undoubtedly a reference to the near-century of housing code law addressing occupancy requirements — and *not* to zoning laws that might for one reason or another have some impact on occupancy. The plain language of the statutory exemption refers to occupancy restrictions — *not* zoning codes — and given the clear historical distinction between these two concepts, the plain language should be given effect.^{10/} Indeed, this distinction is reflected in the fact that the FHAA explicitly applies to zoning practices. See 42 U.S.C. § 3610(g)(2)(C).

^{10/} See *Toibb v. Radloff*, 501 U.S. 157, 160 (1991) (statutory interpretation begins with the plain language of the text).

When Congress exempted "restrictions . . . on occupants," it did so within the context of a longstanding recognition of the legitimate need for health and safety regulations concerning occupancy. And it acted against a background of stubbornly persistent discrimination arising out of community zoning laws (Part III, above) — problems that had simply not been presented by reasonable housing code provisions on occupancy. Thus, Congress chose a term that, as set forth above, has a meaning and historical context entirely distinct from the zoning requirements at issue in this case.^{11/} Occupancy requirements have always been understood as being different from single-family zoning codes.

The statute's reference to occupancy requirements, particularly considering the long-standing meaning and usage of that term, has nothing to do with whether or not the persons living in a dwelling are related. It is, instead, a recognition of the need for health and safety restrictions related to occupancy, not use. The exemption is written in terms of "restrictions" on the "maximum number" of persons in a dwelling — yet zoning requirements such as those at issue here impose no such "restriction" and would in fact permit an unlimited number of family members to live together in a single dwelling.

Of course, a single-family zoning requirement could, in the most indirect sense, have an impact on occupancy by tending to limit the number of people living in any one residence. But that cannot convert a single-family zoning requirement into an "occupancy" restriction. Most obviously, the Edmonds restriction only describes *who* may live in a house together, not *how many* may live there. That is not an occupancy requirement.

This conclusion finds clear support in the historical thrust of occupancy restrictions. Because many new immigrants were called

^{11/} See *Green*, 490 U.S. at 528 (statutory interpretation must make reference to "the surrounding body of law into which the provision must be integrated").

upon to house their relatives who followed them to the United States, occupancy restrictions have never had any regard for family ties. L.M. Friedman, *supra*, at 45. An overcrowded dwelling is a threat to health and safety, regardless of whether it is overcrowded with family members or the unrelated.

Edmonds contends, however, that its zoning ordinance should be considered a "reasonable" restriction on "occupancy" because it is constitutional. See, e.g., Petitioners' Brief on the Merits at 11. But that would read the adjective "reasonable" out of all proportion: if a single-family zoning code is not an "occupancy restriction" at all, it cannot be called a "reasonable" restriction simply because it is constitutional. The statutory reading does not depend on whether, as a matter of constitutional law, Edmonds was permitted to implement this zoning ordinance. The far more straightforward reading of the term "reasonable" is that Congress intended to permit those maximum occupancy standards that were reasonably related to legitimate health and safety concerns. Any zoning or use restriction, as here, might have some indirect impact on "occupancy" — but that does not make a zoning law into a "reasonable" occupancy restriction.

The plain language of the FHAA, particularly when read in light of the clear historical distinctions between occupancy requirements and zoning laws, necessarily resolves the issue before the Court. And, if more is needed, that conclusion finds overwhelming support in the legislative history and underlying purposes of the FHAA.

The Committee reports accompanying the FHAA show an unequivocal intent to attack zoning practices inconsistent with its remedial goals.^{12/} The House Report stated: "The Committee

^{12/} See *Garcia v. United States*, 469 U.S. 70, 76 (1984) (Rehnquist, J.) (Committee reports are the authoritative source for the legislature's intent) (quoting *Zuber v. Allen*, 396 U.S. 168, 186 (1969)).

intends that the prohibition against discrimination against those with handicaps apply to zoning decisions and practices, including "otherwise neutral rules" enforced in a way that "discriminates against people with disabilities." House Report No. 711, 100th Cong., 2d Sess. (1988) at 24, J.A. 148. With respect to the exemption for maximum occupancy restrictions, the Report refers directly to restrictions of the traditional kind:

A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

H.R. 100-711, *supra*, at 31, J.A. 155. With this clearly expressed purpose, and given the longstanding distinction between maximum occupancy codes and zoning restrictions, Congress could not have intended to exempt the latter from the FHAA. This would be contrary to the statutory language, and to the underlying purpose of preventing illegitimate or discriminatory zoning practices.

Reading the statute in the way that Edmonds suggests would lead to a nonsensical result that Congress could not have intended: it would permit the exclusion of group residences like the Oxford House from the very communities best suited for them. At the outset, to receive federal funds, group homes for recovering substance abusers *must* have six or more residents who agree to observe by the Oxford House rules (no use of drugs or alcohol, no disruptive behavior, and regular payment of rent). See 42 U.S.C. 300x-25 (Supp. IV 1992).^{13/} The entire predicate of the group

^{13/} The cited statute is the current version of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4202, 42 U.S.C. 300-4xa (repealed and recodified at 42 U.S.C. 300x-25). Enacted in the same year (continued...)

home is to provide collective support: "After completion of a rehabilitation program, it is crucial for recovering alcoholics and substance abusers to have a supportive, drug and alcohol-free living environment. The support obtained by being in a group of other recovering addicts substantially increases an individual's chances for recovery." *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 456 (D.N.J. 1992) (granting a preliminary injunction against enforcement of single-family zoning ordinance against residents of an Oxford House). To be effective, such group homes must be located in a stable, residential neighborhood — the very neighborhoods most likely to be zoned single-family residential. See generally Brief of the AAMR. Group homes, then, would be caught between the municipalities' upper limits, the federal government's lower limits, and the basic requirements of their mission: they would be forced to compromise their goals in order to exist. This is not a result consonant with a statute aimed at doing away with "land-use regulations . . . that have the effect of limiting the ability of such individuals to live in the residence of their choice in the community." H.R. 100-711, *supra*, at 24, J.A. 148.

CONCLUSION

Zoning codes and occupancy restrictions have distinct histories and purposes. Zoning restricts uses, and while it has many important and legitimate goals, it has a long history of discriminatory misuse. Occupancy restrictions, on the other hand, are more objective standards; they are aimed at health and safety concerns; and they have not in the past been misused for illegitimate purposes. In enacting the FHAA against this background, Congress cannot possibly have intended to give municipalities uncontrolled use of single-family zoning — a recognized tool of discrimination

^{13/}(...continued)

as the FHAA, this Act demonstrates congressional support for group homes for recovering substance abusers by providing federal block grants to encourage establishment of Oxford Houses and other group homes modeled on the same approach.

against disabled people who require congregate living arrangements. This is reflected plainly in the statutory language that exempts only occupancy restrictions, a class of restrictions with a longstanding place in health and safety regulation distinct from the zoning laws that Congress sought to address in the FHAA. The statutory exemption must be read to apply only to traditional occupancy restrictions and not to single-family zoning provisions. The judgment of the Court of Appeals should be affirmed.

Respectfully Submitted,

TIMOTHY C. HESTER
ROBERT A. LONG JR.*
CHRISTINA T. UHLRICH
Covington & Burling
1201 Pennsylvania Ave., N.W.
P.O. Box 7566
Washington, D.C. 20044
(202) 662-6000

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*Counsel of Record

IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

CITY OF EDMONDS,

v.

Petitioner,

WASHINGTON STATE BUILDING CODE COUNCIL, *et al.*
and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF
ADDICTION MEDICINE, AMERICAN PSYCHIATRIC
ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL
WORKERS, INC., AMERICAN METHADONE
TREATMENT ASSOCIATION, NATIONAL
ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE
COUNSELORS, NATIONAL ASSOCIATION OF STATE
ALCOHOL AND DRUG ABUSE DIRECTORS,
NATIONAL COUNCIL ON ALCOHOLISM AND
DRUG DEPENDENCE, SOCIETY FOR RECOVERY
AND THERAPEUTIC COMMUNITIES OF AMERICA
IN SUPPORT OF RESPONDENTS

SETH P. STEIN
ROBERT L. SCHONFELD
STEIN & SCHONFELD
100 Quentin Roosevelt Boulevard
Suite 509
Garden City, New York 11530
(516) 542-0903

SETH P. STEIN
ROBERT L. SCHONFELD
530 W. Fayette Street
Suite 510
Baltimore, Maryland 21201
(410) 783-2744

PAUL M. SMITH *
THOMAS J. PIERELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ELLEN WEBER
LEGAL ACTION CENTER
230 Massachusetts Avenue, N.E.
Suite 505
Washington, D.C. 20002
(202) 544-5475

Counsel for All Amici Except as Noted on Following Page

* Counsel of Record

RICHARD TARANTO
FARR & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184
*Counsel for the
American Psychiatric
Association*

CAROLYN I. POLOWY
General Counsel
NATIONAL ASSOCIATION
OF SOCIAL WORKERS, INC.
750 First St., NE
Washington, D.C. 20002
(202) 408-8600
*Counsel for National
Association of Social
Workers, Inc.*

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS,

v.

Petitioner,

WASHINGTON STATE BUILDING CODE COUNCIL, et al.
and UNITED STATES OF AMERICA,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

BRIEF OF AMICI CURIAE AMERICAN SOCIETY OF
ADDICTION MEDICINE, AMERICAN PSYCHIATRIC
ASSOCIATION, NATIONAL ASSOCIATION OF SOCIAL
WORKERS, INC., AMERICAN METHADONE
TREATMENT ASSOCIATION, NATIONAL
ASSOCIATION OF ALCOHOLISM AND DRUG ABUSE
COUNSELORS, NATIONAL ASSOCIATION OF STATE
ALCOHOL AND DRUG ABUSE DIRECTORS,
NATIONAL COUNCIL ON ALCOHOLISM AND
DRUG DEPENDENCE, SOCIETY FOR RECOVERY
AND THERAPEUTIC COMMUNITIES OF AMERICA
IN SUPPORT OF RESPONDENTS

INTEREST OF AMICI

The American Society of Addiction Medicine is a national medical society of physicians dedicated to improving the treatment of alcoholism and other chemical dependencies and addictions, educating physicians and medical students, promoting research and prevention, and

enlightening and informing the medical community and the public about these issues.

The American Psychiatric Association ("APA"), with approximately 40,000 members, is the Nation's leading organization of physicians specializing in psychiatry. The APA has participated in numerous cases involving mental-health issues, including a case about group homes for the mentally retarded, *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). The Court's resolution of the issue in the present case will affect the range of options open to the APA's members in their treatment of patients.

The National Association of Social Workers, Inc. ("NASW"), a nonprofit professional association with over 150,000 members, is the largest association of social workers in the world. NASW is devoted to promoting the quality and effectiveness of social work practice, to advancing the knowledge base of the social work profession, and to improving the quality of life through utilization of social work knowledge and skills. NASW's policy on "Housing," adopted in 1984 and reaffirmed in 1990, states, in part, that "governmental and private sources must encourage the expansion of the housing supply through a wide range of innovative techniques . . . Housing that is planned for particular population groups such as the elderly, the handicapped, single-parent families, or Native Americans residing on reservations should be included in a spectrum of alternative residences to meet special needs."

The American Methadone Treatment Association ("AMTA") was founded in 1984 to support the development of methadone treatment services and to enhance the quality of patient care in the provision of services to opioid dependent individuals and their families. AMTA worked to develop the State Methadone Treatment Guidelines, which established sound treatment guideposts for state policymakers and treatment providers.

The National Association of Alcoholism and Drug Abuse Counselors ("NAADAC") is the largest national organization representing the interests of more than 18,000 alcoholism and drug abuse professionals across the United States who treat addicted individuals and their families. Founded in 1972, NAADAC is committed to increasing general awareness of alcoholism and drug abuse, and enhanced care of individuals through treatment, education and programs aimed at prevention. NAADAC's efforts are predicated on three basic principles: Alcoholism and other drug dependency must be addressed primarily as a public health problem; access to appropriate care, delivered by credentialed professionals, must be provided to persons dependent on alcohol and other drugs; and public and private funding must be significantly increased and policies improved to provide adequate levels of care for addicted persons.

The National Association of State Alcohol and Drug Abuse Directors represents public policy and program concerns of the State governments and the District of Columbia, Puerto Rico, Guam, and the Virgin Islands. State Directors are responsible for managing over 3.2 billion dollars of alcohol and other drug prevention and treatment services, including grant money from the Substance Abuse and Treatment Block Grant.

The National Council on Alcoholism and Drug Dependence ("NCADD") is a national nonprofit organization combating alcoholism, other drug addictions and related problems through its national office, 150 state and local affiliates and thousands of volunteers in communities throughout America. Founded in 1944, NCADD's primary mission is education, prevention, and public policy advocacy.

The Society for Recovery ("SOAR") is the voice of the nation's grassroots recovery community—those in recovery or in hope of recovery from alcoholism and drug addiction, as well as their families and other concerned

citizens. Through SOAR, that community exercises its citizenship and consumer rights, and works to educate the American public, the media, employers, insurers, health care providers, and government at all levels about the diseases of alcoholism and drug addiction and about the reality of recovery. SOAR works to protect its members' interests in such vital areas as civil rights, access to treatment, insurance and health care benefits, and employment.

Therapeutic Communities of America is the national membership organization of over 400 drug-free, self-help substance abuse treatment and rehabilitation agencies. The organization represents the interests of its member programs and their staff workers, as well as promotes its primary goal of fostering personal growth and changing a person's lifestyle through a community of concerned people working together.

Amici share a strong commitment to ensuring that persons with disabilities are given the opportunity to integrate into mainstream America and that no viable residential or treatment option for persons with disabilities, including those recovering from alcohol or other chemical dependencies, be foreclosed. To this end, *amici* recognize the vital importance of locating group homes and other congregate living arrangements in residential areas in order to provide an appropriate setting for the treatment and development of persons with disabilities. Resolution of the issue in this case will have a major impact on the future development of such residential options.¹

STATEMENT

Amici adopt respondents' statement of the case.

¹ Pursuant to Rule 37.3, the parties have consented to the filing of this brief. Letters memorializing their consent have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

The language, structure and legislative history of the Fair Housing Amendments Act of 1988 ("FHAA") all indicate that Congress did not intend to immunize from scrutiny local zoning ordinances like the one at issue here. To the contrary, the FHAA plainly does apply to the single-family zoning provision in the Edmonds Community Development Code ("ECDC") and thus *may* require the City to allow more than five unrelated persons with disabilities to live together in single-family zones. Congress intended this outcome because it had come to share the view long ago adopted by the *amici* represented here that it is enormously beneficial for most persons with disabilities to live in small residential settings that are integrated with the surrounding community.

Petitioner claims that the real issue is "whether by enacting the FHAA Congress intended to overturn Euclidian zoning and thereby the definition of family approved as reasonable by the U.S. Supreme Court." Pet. Br. 11. But this is nothing more than hollow rhetoric. An affirmance in this case would not prevent localities from maintaining single-family zones. It would require, at most, some flexibility in the application of zoning rules to allow housing for groups of people with disabilities to be established in single-family zones. Nor would such a decision in any way conflict with this Court's prior constitutional rulings in this area.

1. In the FHAA, Congress sought to extend the protection of the Fair Housing Act to those with disabilities and to combat both blatant and subtle forms of discrimination that affect the ability of persons with disabilities to obtain housing of their choice. To this end, Congress broadened the definition of prohibited discrimination to include "a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling."

42 U.S.C. § 3604(f)(3)(B). Both the language of the statute and its legislative history make clear that this definition applies to local government zoning ordinances.

The City of Edmonds can only avoid this requirement if it can show that the zoning ordinance at issue falls within the exemption that Congress created for "local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1). But, as the court of appeals found, a fair reading of this exemption argues against its application here. The single-family zoning provision of the ECDC does not place a limit on the "maximum number" of individuals who may occupy any dwelling. Rather, the ordinance permits an *unlimited* number of family members to live in a dwelling, and only limits the number of unrelated people who may live together.

The legislative history confirms this interpretation. Ordinances such as the ECDC's single-family zoning provision have the direct effect of denying persons with disabilities, who often must live in a group setting, the opportunity to reside in a single-family neighborhood, like any other American. Congress made clear that the Act applies to precisely this kind of ordinance, in order to ensure that persons with disabilities are not denied the opportunity to live in communities of their choice.

2. In passing the FHAA, Congress in no way questioned the value of preserving the single-family character of neighborhoods. Rather, Congress recognized the vast body of research which has demonstrated that community-based housing for persons with disabilities, including those with alcohol or substance abuse problems, is an important component of the range of services for the successful treatment of those disabilities. Allowing persons with disabilities to interact with the community in an ordinary setting may develop confidence and coping skills that cannot be duplicated in an institutional setting. Moreover, group living for persons with disabilities can have great benefits, particularly for those recovering from alcohol and

drug dependency, because it allows individuals to share a supportive family environment where they can build abstinence skills together. Thus, denying people with disabilities the opportunity to live in group homes in residential neighborhoods would close off one of the most beneficial residential options presently known.

For these reasons, the court of appeals' decision should be affirmed.

ARGUMENT

I. THE LANGUAGE OF SECTION 3607(b)(1), WHEN READ IN LIGHT OF THE STATUTE AS A WHOLE, ITS UNDERLYING PURPOSE, AND THE LEGISLATIVE HISTORY, SUPPORTS THE COURT OF APPEALS' INTERPRETATION.

In determining the meaning of section 3607(b)(1), this Court must first consider the language of the statute, guided not by "a single sentence or member of a sentence, but look[ing] to the provisions of the whole law, and to its object and policy." *Pilot Life Insur. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) (quoting, *inter alia*, *United States v. Heirs of Boisdore*, 8 How. 113, 122 (1849)) (internal quotations omitted). Such guidance is particularly relevant where, as here, the provision sought to be interpreted is an exemption to a general rule established by the statute. See *John Hancock Life Insur. Co. v. Harris Trust & Savings Bank*, 114 S. Ct. 517, 524-25 (1993) (quoting *Commissioner v. Clark*, 489 U.S. 726, 739 (1989)) ("when a general policy is qualified by an exception, the Court 'usually read[s] the exception narrowly in order to preserve the primary operation' " of the statute); *A. H. Phillips, Inc. v. Walling*, 324 U.S. 490, 493 (1945) ("To extend an exemption to other than those plainly and unmistakably within its terms and spirit is to abuse the interpretative process and to frustrate the announced will of the people."). This principle has even more vitality in the interpretation of remedial legislation, such as the Fair Housing Act, which must ordinarily be

broadly construed. See *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380 (1982) (rejecting a narrow interpretation of the FHA as “undermin[ing] the broad remedial intent of Congress embodied in the Act”); *Jefferson County Pharmaceutical Ass’n v. Abbott Laboratories*, 460 U.S. 150, 158-59 (1983); *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967); N. Singer, 3 Sutherland’s Statutes and Statutory Construction § 60.01 (5th ed. 1992). The court of appeals properly applied these principles in determining that the FHAA does not exempt ordinances such as the one at issue here.

A. The paramount goal of the Fair Housing Amendments Act was “to end the unnecessary exclusion of persons with handicaps from the American mainstream.” H.R. Rep. No. 711, 100th Cong., 2d Sess. 31 (1988), reprinted in 1988 U.S. Code Cong. & Ad. News 2173, 2179 [hereinafter “House Report”]. In the view of the 100th Congress, a crucial means to this end was the fostering of independent living by persons with disabilities in ordinary American communities. Congress thus expressly indicated its desire to protect and promote congregate living among persons with disabilities. See *id.* at 2185 (noting problem of exclusion of “congregate living arrangements among non-related persons with disabilities”).

To further this goal, Congress did two things. First, it mandated that persons with disabilities should be treated under the law like other protected classes (such as those based on race, gender and national origin)—sometimes simply inserting the word “handicap” in a list of protected groups.² But Congress also defined prohibited dis-

² Courts, in recognition of this parity have applied “disparate treatment” and “disparate impact” analyses in disability cases just as in cases involving racial or sex discrimination. See, e.g., *Horizon House Dev. Servs. Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D.Pa. 1992), *aff’d*, 995 F.2d 217 (3d Cir. 1993) (striking down a 1,000 foot spacing requirement by applying disparate treatment and impact analyses); *Potomac Group Home*

crimination against persons with disabilities more broadly than it defined discrimination against other covered groups. Under the FHAA, discrimination against persons with disabilities includes “a refusal to make reasonable accommodations in rules, policies, practices, or services, when such accommodations may be necessary to afford such [handicapped] person equal opportunity to use and enjoy a dwelling.” 42 U.S.C. § 3604(f)(3)(B). Thus, because of the unique needs of persons with disabilities, Congress required that exceptions be made, where reasonably possible, in the application of neutral rules and practices that deny equal access to housing for persons with disabilities—including laws “excluding, for example, congregate living arrangements for persons with handicaps.” House Report at 2185.

In targeting a broad range of practices, Congress well understood that landlords were not the only sources of discrimination. Thus, Congress expressly extended the statute’s prohibitions to cover local land use regulations, including zoning ordinances. See 42 U.S.C. § 3610(g)(2)(C) (directing the HUD Secretary to refer all complaints involving “the legality of any State or local zoning or other land use law or ordinance” to the Attorney General); House Report at 2184 (“These new subsections would also apply to state or local land use and health and safety laws, regulations, practices or decisions which discriminate against individuals with handicaps.”). It is with this background in mind that the Court should proceed to determine the scope of the statutory exemption on which petitioner relies.

Corp. v. Montgomery County, 823 F. Supp. 1285 (D.Md. 1993) (striking down neighbor notification requirement on a disparate treatment theory); *Oxford House, Inc. v. Town of Babylon*, 819 F. Supp. 1179 (E.D.N.Y. 1993) (applying disparate impact analysis to enjoin enforcement of a “single-family dwelling” zoning ordinance).

B. Section 3607(b)(1) provides that “[n]othing in this subchapter limits the applicability of any reasonable local, State, or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling.” By its terms, the exemption thus applies only to restrictions placing a “maximum number” on the “occupants” that may reside in a particular dwelling. Petitioner argues that its single-family zoning ordinance is covered by Section 3607(b)(1) because it constitutes an overall limit on occupancy (five persons or less) that just happens to be combined with an exemption for single families. But, while this might be a conceivable interpretation of the statutory language when read in isolation, it has little else to recommend it.

First, this argument depends on a mischaracterization of the primary purpose of the ECDC’s single-family zoning ordinance. It is evident that the primary purpose was not to limit the number of occupants in homes—to an arbitrary number that applies regardless of the size of the residence—but to create a single-family zone. Moreover, petitioner’s reading of the FHAA leads to a very odd result. Under this reading, a zoning ordinance that allowed *only* families (of unspecified size) would not be exempted from the FHAA (because it would not set a “maximum number” of occupants) while the addition of a provision authorizing a maximum number of unrelated persons to share a dwelling would suddenly create an exemption. There is absolutely no evidence that Congress intended to draw such a line and, even under petitioner’s view, there is no apparent reason why Congress would have wanted to do so.

Petitioner’s argument also makes little sense when one considers the nature of the “discrimination” Congress was seeking to prevent. The FHAA provides that it constitutes discrimination to fail to take reasonable affirmative steps to accommodate persons with disabilities and allow their inclusion in housing occupied by others. *See* 42 U.S.C.

§ 3604(f)(3)(B). Having done so, it hardly would have made sense for Congress to exempt from coverage the very type of law—mandating single-family zoning—that by petitioner’s own account dominates the American scene. After all, this would have meant that no “accommodation” of persons with disabilities—even a “reasonable” one—would be required in the neighborhoods where most non-disabled Americans choose to live if they can afford to do so.

Such a result clearly would contravene Congress’s stated goal in passing the FHAA, and there is no evidence that Congress sought to limit the Act’s effect so drastically. To the contrary, Congress inserted in the exemption provision a requirement that restrictions on the number of occupants be “reasonable”—thereby giving courts an added measure of authority to consider the import of each state and local law on the achievement of the federal statutory purposes.³

By contrast, the interpretation adopted below has much to recommend it. To begin with, the ECDC’s single-family zoning ordinance does *not*, in fact, impose any limit on the “maximum number” of individuals who may live in a house. Absent any other regulation, a family of thirty could permissibly live in a small one-bedroom house in the City of Edmonds. The only reason that such a situation is not allowed is that the Uniform Housing Code, which the City of Edmonds has adopted, imposes a separate restriction on the “maximum number” of occupants that may reside in a dwelling of a given square

³ This interpretation of § 3607(b)(1) does not collapse the “reasonableness” requirement of that section with the “reasonable accommodation” requirement in § 3604(f)(3)(B). *See* Pet. Br. at 17. The latter requirement applies only to persons with disabilities. By contrast, an assessment of the reasonableness of a local occupancy limit under § 3607(b)(1) would take into account its impact on a broad range of persons and statutory policies—including the policy barring exclusion of families with children. *See* p. 13 *infra*.

footage. This provision, which is designed to protect the health and safety of occupants in the dwelling, falls within the clear terms of the statutory exemption. The ECDC's single-family zoning provision, which is designed to preserve the character of the neighborhood and does not place a ceiling on the possible number of occupants in a given dwelling, does not.

The legislative history confirms that Congress was seeking to exempt ordinances like the square footage restrictions of the UHC, but not the ECDC's single-family zoning provision. Congress recognized that one "method of making housing unavailable to people with disabilities has been the application or enforcement of otherwise neutral rules and regulations on health, safety and land-use in a manner which discriminates against people with disabilities." House Report at 2185. Because a zoning ordinance that creates exceptions for certain favored groups or types of living arrangements would operate to disfavor persons with disabilities as compared to the favored groups, Congress only exempted ordinances that apply uniformly to "all occupants." *Id.* at 2192 (emphasis added). The House Judiciary Committee explained the exemption as follows:

A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.

Id. at 2192.⁴

⁴ It is telling that the House Judiciary Committee, when given the opportunity to provide an example of a zoning ordinance that *would be exempt* under § 3607(b)(1), pointed to a restriction on the maximum number of people that could occupy a house of a given square footage.

At the same time, the legislative history reveals that Congress's actual intent in passing Section 3607(b)(1) had nothing whatsoever to do with the siting of group homes in single-family neighborhoods. As explained in the House Report:

Section 6(d) amends Section 807 to make additional exemptions *relating to the familial status provisions*. These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit.

House Report at 2192 (emphasis added).⁵ Thus, Congress established the exemption to ensure that the extension of the FHA to prohibit discrimination against *families with children* would not preclude local governments from enforcing *bona fide* health and safety regulations limiting the number of occupants in a dwelling. There is, however, no need to establish an exemption for *single-family zoning ordinances* to protect them from the effect of the *familial status provisions* of the FHAA, because, by definition, families with children are already permitted to live in such zones. Thus, contrary to petitioner's claim, Congress could not have intended the exemption to target ordinances like the ECDC's single-family zoning ordinance.

Ordinances such as the one at issue in this case are not health and safety regulations and do not place a limit that applies to *all* occupants. Such ordinances thus operate to shut persons with disabilities out of single-

⁵ The bill's sponsor echoed this understanding: "Persons who choose to bear or care for children should not be subjected to discrimination in their search for affordable, decent housing. The bill is carefully drafted to take into account circumstances where limitations on children may be valid. For example, the bill does not prevent governments from imposing safety and health related limitations on the number of persons who may occupy a housing unit." 133 Cong. Rec. S2256 (daily ed. Feb. 19, 1987) (remarks of Senator Metzenbaum).

family neighborhoods and do not qualify for the exemption under Section 3607(b)(1).

C. In order to avoid the natural meaning of the Fair Housing Amendments Act, petitioner attempts to muddle the statutory construction issue. First, it attempts to support its interpretation by pointing to decisions of this and other federal courts using the term "occupant." Pet. Br. 12-17. But none of those cases involved issues similar to the one presented here, and this exercise is therefore entirely pointless.

Second, petitioner argues that certain assumptions which it believes underlay this Court's decisions in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), and *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), should control the interpretation of Section 3607(b)(1). According to petitioner, because *Belle Terre* approved the powers of local governments to impose single-family zoning restrictions and *City of East Cleveland* recognized a constitutional limitation on the powers of local government's to restrict families from living together, Congress must have understood the language of Section 3607(b)(1) to exempt single-family zoning restrictions. Once again, however, there is no indication in the statute or its legislative history that Congress intended the language of the Act to be construed in light of *Belle Terre* or *City of East Cleveland*. Moreover, had Congress wished to exempt single family zoning ordinances, it could have easily done so. That Congress did not do so weighs heavily against petitioner's argument.

Petitioner also suggests that the Court must construe Section 3607(b)(1) in light of *City of East Cleveland* and *Belle Terre* because of the constitutional stature of these cases. In *Belle Terre* and *City of East Cleveland*, however, this Court considered constitutional limitations on the powers of local governments to regulate the use of property. In neither case did the Court have occasion to

consider the extent of Congress's power to require accommodations in local zoning ordinances; there is little doubt that Congress can require such accommodations.⁶ Thus, the principle that a court should construe a statute away from any possible constitutional infirmity is simply not implicated in this case. *Belle Terre* and *City of East Cleveland* have nothing to say about Congress's intent when it passed the Fair Housing Amendments Act.

At bottom, petitioner's argument is premised on the claim that affirmance in this case will destroy single-family zoning all across the country and that Congress could not have intended this. This claim, however, is baseless. To begin with, the decision below only applies to persons with disabilities; it leaves in place the City's limit on the number of unrelated non-disabled persons who may reside together. Moreover, even as to persons with disabilities, the only "accommodations" required by the FHAA are those that are "reasonable." Cf. *Alexander v. Choate*, 469 U.S. 287, 300 (1985) (applying an analogous provision in the Rehabilitation Act) ("while a [city] need not be required to make 'fundamental' or 'substantial' modifications to accommodate the handicapped, it may be required to make 'reasonable' ones").

To the extent that petitioner is suggesting that it would destroy single-family zones to require any accommodation of congregate living facilities for persons with dis-

⁶ Petitioner seeks support for its argument from the concurring and dissenting opinions in *City of East Cleveland*. Although these opinions are irrelevant to an understanding of Congress's intent in passing the Fair Housing Amendments Act, they do demonstrate that there is a clear distinction between zoning ordinances that restrict the maximum number of occupants in a residence because of health and safety concerns and ordinances that restrict groups of unrelated occupants from living together in order to preserve the character of a neighborhood. See *City of East Cleveland*, 431 U.S. at 520 n.16 (Stevens, J., concurring). This is exactly the line that Congress drew with Section 3607(b)(1), which exempts the former type of ordinance, but not the latter, from the Fair Housing Act.

abilities with more than five residents, there is no reason to suppose that Congress would have shared this view.⁷ After all, by allowing unlimited numbers of family members to reside in a given dwelling, whether constitutionally compelled or not, the City of Edmonds has recognized that the single-family character of a neighborhood will not be destroyed by the presence of individual houses with large numbers of occupants. There is no basis, other than the very prejudice that Congress was seeking to combat, for assuming that a "reasonable" number of relatively large homes for persons with disabilities in such a neighborhood would have a different impact.

II. CONGRESS'S GOAL TO ENSURE THAT PERSONS WITH DISABILITIES HAVE ADEQUATE OPPORTUNITIES TO LIVE IN COMMUNITY-BASED HOUSING IN RESIDENTIAL AREAS COMPORTS WITH THE SUBSTANTIAL BODY OF SCIENTIFIC EVIDENCE THAT SUCH HOUSING IS ESSENTIAL TO THE HEALTH AND WELL-BEING OF THOSE WITH DISABILITIES.

In resolving this case, *amici* believe that the Court should take into account the well-established consensus view among treatment professionals that persons with disabilities, including those who are recovering from alcoholism or substance abuse, can generally lead better lives if they reside *in* the community, rather than being excluded from, or zoned out of, residential areas. This basic understanding, shared by the diverse organizations represented here, is relevant to the present issue of statutory construction because it is clear that the same understanding led to Congress's decision to add protection for

⁷ Congress also made clear that the fact that a particular rule or policy has a long tradition, such as single-family zoning, does not make such rule or policy immune from the operation of the Act. See House Report at 2186 ("A discriminatory rule, policy, practice or service is not defensible simply because that is the manner in which such rule or practice has traditionally been constituted.").

persons with disabilities to the Fair Housing Act in 1988. Congress, having recognized the importance of integrating persons with disabilities into the American mainstream, can hardly have intended that the exemption in § 3607 (b)(1) be applied so broadly that it would excuse localities from any duty to "accommodate" persons with disabilities in single-family zones.

A. In the late 19th and early 20th centuries, it was governmental policy to "protect" society from persons with disabilities.⁸ See Mason & Menolascino, *The Right to Treatment for Mentally Retarded Persons: An Evolving Legal and Scientific Interface*, 10 Creighton L. Rev. 124, 130 (1976); Burgdorf & Burgdorf, *The Wicked Witch is Almost Dead: Buck v. Bell and the Sterilization of Handicapped Persons*, 50 Temple L.Q. 995, 997 (1977). As Justice Marshall once noted, American society at one time viewed persons with disabilities as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems" and, as a result, governments sought, at a minimum, to segregate, and, in the extreme, to "extinguish" individuals classified as "retarded." *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 461-63 (1985) (Marshall, J., concurring in the judgment in part and dissenting in part).⁹

Since World War II, however, a new understanding has emerged. Professionals and researchers now recognize that

⁸ This "Progressive Era" point of view was actually a backward development from the attitudes held during the mid-19th century when small, community-based centers were used to provide education and training for persons with disabilities. See Scheerenberger, *A History of Mental Retardation* (1983); Ferleger, *Anti-Institutionalization and the Supreme Court*, 14 Rutgers L.J. 595, 614-16 (1983).

⁹ While this case involves persons with histories of substance abuse, petitioner's ordinance would be equally applicable to people with any form of disability who wanted or needed to live with more than four peers. We therefore discuss research involving mental retardation and other forms of disability here as well.

most persons with disabilities fare much better when permitted to live in an environment that replicates as closely as possible the regular circumstances and ways of society. See Wolfensberger, *The Principle of Normalization in Human Services* 27-28 (1972); Rothman & Rothman, *The Willowbrook Wars* 48-49 (1984). Numerous studies have shown that unwarranted institutionalization has an adverse effect on motor, learning and communication skills and general social competency, often preventing achievement of maximum intellectual or physical potential. See, e.g., Bruininks, Thurlow, Thurman & Fiorelli, *Deinstitutionalization and Community Services*, in 11 *Mental Retardation and Developmental Disabilities* (J. Wortis ed. 1980); Woloshin, et al., *The Institutionalization of Mentally Retarded Men Through the Use of a Halfway House*, *J. Ment. Retard.* 21 (June 1966); Tizard, *Community Services for the Mentally Retarded* (1964); Phillips & Bathazar, *Some Correlates of Language Deterioration in Severely and Profoundly Retarded Long-Term Institutionalized Residents*, 83 *Am. J. Mental Deficiency* 402-08 (1979).

By contrast, the research shows that integration into community living can give many persons with disabilities a chance to achieve their human potential and become contributing members of society. For example, a study involving persons with mental retardation compared individuals moved from Pennsylvania's Pennhurst State School to community settings with those who remained at the school and concluded that:

Continual behavioral growth toward independence is a central goal of services for people with mental retardation. We have found, by every scientific design and test available, that people who went to CLAs (community living arrangements) are better off in this regard. They have made more progress than similar people still at Pennhurst, and more than they themselves made while at Pennhurst. These people have become more able to do things for

themselves rather than having things done for them. . . . We also find that the people who seem to make the greatest gains in adaptive behavior tend to be those who start out the lowest. That is, the people with the most severe impairments turn out to be among those who benefit the most from community placement. The adaptive growth behavior displayed by people who have moved to CLAs . . . is literally ten times greater than the growth displayed by matched people who are still at Pennhurst.

Conroy & Bradley, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* 314-15 (1985). And studies focused on treatment of mental illness, as well as alcoholism and substance abuse, have confirmed the value of placement in integrated "community" settings. See Lehman, Slaughter & Myers, *Quality of Life in Alternative Residential Settings*, 62 *Psychiatric Quarterly* 35 (1991) (mental illness); Molloy, *Development and Evaluation of the New Jersey Network of Oxford Houses* 17 (1992) (two-year study finding that "[l]iving in an Oxford House results in continuous sobriety for most residents"); Maddux & Desmond, *Residence Relocation Inhibits Opioid Dependence*, 39 *Archives of General Psychiatry* 1313-17 (1982) (abstinence rates of opiate addicts three times higher for individuals who were relocated into residential neighborhoods).

As we have suggested, this vast body of research formed the backdrop against which Congress acted in passing the Fair Housing Amendments Act. Congress sought both to attack the still-common fallacies about persons with disabilities and to foster the ability of persons with disabilities to live in communities of their choice. In prohibiting discrimination in housing, Congress hoped to change the stereotypes and combat the "misperceptions, ignorance, and outright prejudice" that was preventing those with disabilities from participating in mainstream American life. House Report at 2179. In requiring land-

lords and local governments to make reasonable adjustments of their rules and policies and by mandating certain features that will make future dwellings more accessible, Congress sought to increase the availability of housing in the community for those with disabilities.

B. The 100th Congress also understood that, for many persons with disabilities, the most suitable housing option is a home where they can live (1) with a *group* of peers and (2) in a typical residential neighborhood. The House Report itself noted how local zoning ordinances had been used to prevent congregate living arrangements among persons with disabilities and made clear that the Act was designed to prevent such discriminatory effects. Moreover, just one month after the passage of the FHAA, the same Congress passed the Anti-Drug Abuse Act of 1988, which required States receiving certain federal block grants to make loans to establish group homes of six or more persons recovering from alcohol and drug dependency. See Pub. L. No. 100-690, 102 Stat. 4204 (previously codified as 42 U.S.C. § 300x-4a and currently codified in revised form at 42 U.S.C. § 300x-25).

This congressional endorsement of congregate residential options for persons with histories of substance abuse is well-founded. It is well-established that addicted individuals can help themselves by helping each other abstain from alcohol and drugs for a long enough time to learn a new value system that rejects drug and alcohol use. See Molloy, *Self-Run, Self Supported Houses for More Effective Recovery from Alcohol and Drug Addiction* (1992); Borkman, *Self-Help Groups at the Turning Point: Emerging Egalitarian Alliances with the Formal Health Care System*, 18 Am. J. Community Psychology 321, 321-22 (1990). Research has demonstrated the correlation between a stable job and a supportive family and the likelihood of alcohol and drug dependent individuals sustaining recovery; those who have such bases of support

are most likely to change their harmful behavior. Institute of Medicine, *Treating Drug Problems* 127 (1990). For the many alcohol and drug-dependent individuals who are not as fortunate, however, programs such as the Oxford Houses provide an environment in which individuals can change their drug and alcohol-using behavior and gain the skills necessary for lifelong abstinence. For this reason, residents run each house democratically and carry out all of the responsibilities of a family, including managing and financially supporting the household and lending guidance and emotional support to each other.

Although the focus on creating a supportive group environment is important to all persons recovering from alcohol and drug dependency, it is particularly important for women with children. Research has shown treatment services often must be gender-specific, to focus on the emotional and relational needs of women, and to provide comprehensive health and social services, childcare and parenting training. Wilsnack & Beckman, *Alcohol Problems in Women* (1984). Oxford Houses satisfy many of these needs. Women have a safe, drug-free environment for themselves and their children, and are surrounded by other women who possess both emotional and practical understanding of the difficulties faced. They also have the opportunity to learn practical skills and develop confidence. This process has appropriately been described as enabling individuals to "re-family." Dvorchak, Grams, Tate & Jason, *Pregnant and Postpartum Women in Recovery: Barriers to Treatment and the Role of Oxford House in the Continuation of Care* (1994) (submitted for publication).

As we have suggested, it is equally important that groups of persons with disabilities be able to live in typical residential neighborhoods that offer the same opportunities for social integration and interaction that are available for non-disabled people. See Butler & Bjaanes, *Activities*

and the Use of Time by Retarded Persons in Community Care Facilities, in *Observing Behavior: Theory and Applications in Mental Retardation* 379, 438-39 (G. Sackett ed. 1978); Gailey, *Group Homes and Single Family Zoning*, 4 *Zoning and Planning Law Report* 97 (Feb. 1981); Lowinson and Langrod, *Neighborhood Drug Treatment Centers*, N.Y. *State Journal of Medicine* 766 (1975) (rehabilitation for substance abusers is more effective in residential neighborhoods than in large institutions); Mollo, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction* 16 & n.12 (1992) (recovering addicts and alcoholics have a particular need to live in residential communities and to avoid neighborhoods where drugs and alcohol dominate).

For example, for many drug and alcohol dependent individuals in group homes, sustaining recovery and providing the opportunity to "re-family" can best be accomplished in a setting surrounded by families. Liquor stores and open drug dealing are typically less prevalent in such neighborhoods. Residents are better able to avoid settings that might jeopardize their recovery because they are strongly associated with drug or alcohol acquisition. Institute of Medicine, *Treating Drug Problems* 73 (1990). Finally, living in single-family neighborhoods enables residents to observe and emulate the middle-class lifestyle and values that they seek to embrace through sustained recovery.

The importance of community-based settings for many persons with disabilities is clearly demonstrated by the prevalence of such facilities. In 1977, there were 11,008 state-licensed or state-operated community residences for persons with mental retardation throughout the United States. By 1993, that number had grown to 60,455. See Mangan, Blake, Prouty & Lakin, *Residential Services for Persons with Mental Retardation and Related Conditions: Status and Trends Through 1993*, vi-vii (1994).

Congress's enactment of the FHAA and its establishment of grants for group homes demonstrate Congress's desire to foster community-based programs for persons with disabilities. Only by breaking down the barriers that prevent persons with disabilities from living in the communities in which most Americans live and by providing the always crucial funding could Congress accomplish its objective. The requirement in the FHAA that local communities make reasonable accommodations to single-family zoning requirements for group homes and the federal grant programs thus go hand-in-hand to further the objectives of the FHAA to "end the unnecessary exclusion of persons with handicaps from the American mainstream." House Report at 2179.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

SETH P. STEIN
ROBERT L. SCHONFELD
STEIN & SCHONFELD
100 Quentin Roosevelt Boulevard
Suite 509
Garden City, New York 11530
(516) 542-0088

BETH PEPPER
STEIN & SCHONFELD
520 W. Fayette Street
Suite 310
Baltimore, Maryland 21201
(410) 752-2744

PAUL M. SMITH *
THOMAS J. PERRELLI
JENNER & BLOCK
601 Thirteenth Street, N.W.
Washington, D.C. 20005
(202) 639-6000

ELLEN WEBER
LEGAL ACTION CENTER
236 Massachusetts Avenue, N.E.
Suite 505
Washington, D.C. 20002
(202) 544-5478

* Counsel of Record

*Counsel for All Amici Except the American Psychiatric Association
and the National Association of Social Workers, Inc.*

RICHARD TARANTO
FARR & TARANTO
2445 M Street, N.W.
Washington, D.C. 20037
(202) 775-0184

*Counsel for the
American Psychiatric
Association*

CAROLYN I. POLOWY
General Counsel
NATIONAL ASSOCIATION
OF SOCIAL WORKERS, INC.
750 First St., NE
Washington, D.C. 20002
(202) 408-8600

*Counsel for National
Association of Social
Workers, Inc.*

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IN THE
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OCTOBER TERM, 1994

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v.

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Respondents.

On Writ of Certiorari to the
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TRAIN DISPATCHERS DIVISION OF THE
BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
THE BROTHERHOOD OF LOCOMOTIVE ENGINEERS,
THE BROTHERHOOD OF RAILROAD SIGNALMEN,
AND THE UNITED TRANSPORTATION UNION
IN SUPPORT OF RESPONDENTS

LAWRENCE M. MANN
ALPER & MANN, PC
400 North Capital Street, N.W.
Suite 201
Washington, D.C. 20001
(202) 338-9121
Special for Amici Curiae

BEST AVAILABLE COPY

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INTEREST OF AMICUS

The American Train Dispatchers Division of the Brotherhood of Locomotive Engineers, The Brotherhood of Locomotive Engineers, the Brotherhood of Railroad Signalmen, and the United Transportation Union are railway labor organizations having a direct interest in the assurance of railroad safety. To assure safe operating conditions for their members, the Brotherhoods have—since the beginning—fostered abstinence from any alcohol

or addictive drugs on the job. Through collective bargaining with the railroad industry, the railway labor organizations have actively fostered intervention and treatment whenever a railroad employee becomes afflicted with alcoholism or drug addiction. As part of such intervention and treatment, addicted employees are afforded an opportunity to develop behavior necessary to stay clean and sober. Once an addicted individual has changed behavior and developed behavior likely to result in long-term sobriety, employment is resumed. Utilization of self-help programs such as Oxford House often provide the kind of support necessary for an alcoholic or drug addicted employee to develop long-term abstinence from the use of any alcohol or drugs.

INTRODUCTION

The location of Oxford House-Edmonds is similar in the location, type and size to the more than 500 other Oxford Houses throughout the country. While the first Oxford House was started in 1975 in Silver Spring, Maryland, the number of houses has rapidly increased since 1989 as a result of enactment of § 2036 of Pub. L. 100-690, the Anti-Drug Abuse Act of 1988.¹ Each of the Oxford Houses is an equal member of Oxford House, Inc., the non-profit, umbrella organization for the national network of individual houses. The umbrella organization provides a charter to groups of six or more recovering individuals who rent a house together and follow the standardized system of operations developed by the organization. Each charter has three conditions: (1) the group must be democratically self-run, (2) the group must be financially self-supported, and (3) the group must immediately expel any resident who returns to using alcohol or drugs. These three conditions form the basis of the conditions for the promotion of recovery homes under

¹ See Department of Health and Human Services Publication No. (SMA) 93-1678: *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction*, 1993.

§ 2036 of Pub. L. 100-690, the Anti-Drug Abuse Act of 1988. 42 U.S.C. 300x-25.

Shortly after enactment of the recovery house provision in Pub. L. 100-690, the magazine of the professional association of employee assistance program (EAP) directors ran an article entitled: After Treatment, Oxford House Answers the Question of "What Next?"² "EAPs have struggled for years with the "revolving door syndrome," it stated, "It may be that just as the Oxford House concept of communal living is a link in the recovery chain, it can play a major part in EAP referral and follow up."³

Railway labor organizations have first hand knowledge of the value of an effective peer program to provide a continuum of support for the recovering alcoholic and drug addict. Many of the labor organizations were started in the last century as temperance organizations. The industry itself had Rule G which prohibited the use of any alcohol or drugs on the job or before coming to work. In 1976, the Federal Railroad Administration conducted a detailed study of alcohol and drug abuse programs in the railroad industry.⁴ That report recommended close cooperation between railroad management and labor organizations for prevention, intervention and treatment. The Federal Railroad Administration also contracted a cooperative labor and management study of the industry between 1977 and 1979 to determine the extent of alcohol and drug problems among railway employees.⁵ As an

² EAPA Exchange, November 1989.

³ *Id.* p. 27.

⁴ Report No. FRA/OPPD-OR&D 76-283, A Survey of Alcohol and Drug Abuse Programs in the Railroad Industry.

⁵ *Problem Drinking Among Railroad Workers: Extent, Impact and Solutions*, University Research Corporation, Washington, 1979. Known as the REAP Study the survey involved 234,000 railroad

outgrowth of that report, railway labor organizations took a number of steps to deal with the problem including collectively bargained health insurance coverage for treatment and a change in practices for dealing with the use of alcohol and drugs by employees. Today, Operation RedBlock is a peer prevention, intervention and treatment program whereby members of labor organizations work with each other to prevent alcohol or drug use on the job or before coming to work and help the individual with an addiction to get treatment.⁶ In the Operation RedBlock program volunteers also assist the recovering employee after treatment to help prevent relapse.

Recovery from alcoholism and drug addiction is a process to develop life-long behavior change necessary to avoid drinking any alcohol or using any addictive drug. Self-help programs such as Alcoholics Anonymous and Oxford House are valuable tools to help the recovering alcoholic and drug addict stay clean and sober.

Within the railroad industry the decline in active alcoholism and drug abuse as a result of Operation RedBlock and related programs has been so significant that random testing of employees as required by the Federal Railroad Administration has been reduced from a requirement of annually testing 50% of the workforce to a requirement of annually testing 25% of the workforce. The lower testing requirement is the result of finding less than 1% positives from the preceding two-year testing period.⁷

employees and found 25% were non-drinkers; 56% drink without problems and 19% were problem drinkers.

⁶ Bacharach, Bamberger and Sonnenstuhl, *Member Assistance Programs in the Workplace: The Role of Labor in the Prevention and Treatment of Substance Abuse*, ILR Press, Ithica, New York, 1994.

⁷ 49 CFR Part 219; 59 FR 67641, December 30, 1994. Note that the positive test rate for a 50 percent random sample of railroad employees was but .79 in 1992 and .72 in 1993.

The railway labor organizations know that treatment for alcoholism and drug addiction works if there is an organized program of support for an alcohol and drug-free workplace and an opportunity for the afflicted addicted employee to learn the behavior necessary for recovery. The Oxford House program which permits groups of six or more recovering individuals to live together in a rented house following a standardized system of democratic operations, mutual support and strict adherence to staying clean and sober, is an important resource for providing recovering persons the opportunity to stay clean and sober forever.

Therefore, it is important that local jurisdictions make a reasonable accommodation in their zoning laws to permit Oxford Houses to be rented in good neighborhoods. Moreover, the extent of the continuing problem of alcoholism and drug abuse in the population at large necessitates the mass replication of recovery houses which can only take place if handicapped individuals are able to rent and establish such houses without protracted adjudication and litigation.

ARGUMENT

THE FEDERAL HOUSING AMENDMENTS ACT OF 1988 PERMITS HANDICAPPED INDIVIDUALS RECOVERING FROM ALCOHOLISM AND DRUG ADDICTION TO ENJOY THE SAME SPECIAL ZONING STATUS ACCORDED FAMILIES UNDER THE CONSTITUTION.

Treatment for alcoholism and drug addiction involves much more than simple detoxification. The best description of treatment of the alcoholic and drug addict continues to be Vernon Johnson's four steps—(1) intervention; (2) detoxification; (3) education, and (4) long term behavior change.⁸ The maintenance of "long-term behavior change" is the most difficult part of successful treatment for the alcoholic and drug addict. In 1988, Dr. Arnold M. Ludwig, a professor of psychiatry at the University of Kentucky, reported that eighteen month follow-up studies of alcoholics after treatment showed that about one-half of the alcoholics managed to stay dry for a minimum of three months; about one-third for six months; about one-sixth for twelve months; and less than one-tenth for the entire eighteen month period.⁹ Dr. George E. Vaillant, in a long-term longitudinal study reported a similarly high relapse rate of 80% for alcoholics two years following treatment.¹⁰

The concept underlying self-run, self-supported recovery houses is the same as the one underlying Alcoholics Anonymous and Narcotics Anonymous—addicted individuals can help themselves by helping each other abstain from alcohol

⁸ Vernon E. Johnson, *I'll Quit Tomorrow*, Harper and Row, San Francisco, 1980. (See particularly chapters 5 and 7 and Appendix A.)

⁹ Arnold M. Ludwig, M.D., *Understanding the Alcoholics Mind*, Oxford University Press, New York 1988, p. 51.

¹⁰ George E. Vaillant, M.D. *The Natural History of Alcoholism*, Harvard University Press, Cambridge, Massachusetts, 1983.

and drug use one day at a time for a long enough time to permit a new set of values to be substituted for the values of a lifestyle in which alcohol and drugs were used.¹¹ Vaillant enumerates the following four components of treatment which can provide the recovering alcoholic with the means for changing behavior: (1) offering the patient a non-chemical substitute dependency for alcohol, (2) reminding him ritually that even one drink can lead to pain and relapse, (3) repairing the social and medical damage that he has experienced, and (4) restoring self-esteem.¹² He goes on to point out that "self-help groups, of which Alcoholics Anonymous is one model, offer the simplest way of providing the recovering alcoholic with all four components referred to above."¹³ Many recovering alcoholics need both the time and support of congregate living. Oxford Houses provide that time and support in a way that foster the four components of successful treatment set forth by Dr. Vaillant. The democratic self-rule of a sufficiently sized group allows the individual resident to relearn or learn responsible behavior and values without the use of alcohol. The open-ended time frame in which an individual can live in a house takes into account individual differences in mastering new behavior to assure total abstinence. For railroad employees at work, programs such as Operation RedBlock supplement the support that is provided in an Oxford House and at self-help meetings such as Alcoholics Anonymous. This comprehensive approach prevents relapse and makes treatment effective.

The location of an Oxford House in a good neighborhood further enhances the prospects of successful recovery.

¹¹ U.S. Department of Health and Human Services, Technical Assistance Publication Series Number 5, *Self-Run, Self-Supported Houses for More Effective Recovery from Alcohol and Drug Addiction*. DHHS Publication No. (SMA) 93-1678, p. 7.

¹² Vaillant, op. cit. 300.

¹³ *Id.* 301.

This is why an appropriate application of The Federal Fair Housing Admendments Act of 1988 ("FHAA") is important.

FHAA broadly protects persons with disabilities against discrimination in all forms of housing. 42 U.S.C. § 3602(h). When FHAA was enacted, Congress recognized that sometimes rules and regulations might have to be altered in order for persons with disabilities to have equal access to and use of housing. Specifically, Congress included in the definition of discrimination "a refusal to make reasonable accommodation in rules, policies, practices, or services, when such accommodations may be necessary to afford such person equal opportunity to use and enjoy a dwelling." 42 U.S.C. § 3604(3)(B).

Handicapped recovering alcoholics and drug addicts are in a vulnerable position in two ways: (1) their past addictive behavior has often left them with family, employment, financial or other problems, and (2) the challenge of learning new behavior free of alcohol or drug use. Where they used to live is sometimes not an option and if it is it may make it more difficult to change behavior because of old habits, friends and family stress. The length of time and individual needs to live with others in the same situation varies with each individual situation. However, the average length of stay in an Oxford House is thirteen months.¹⁴

The question in this case is whether the exemption contained in § 3607(b)(1) of the FHAA permits the City of Edmonds, Washington not to accommodate a group of unrelated handicapped individuals who because of their handicap (recovery from alcoholism and drug addict) reside together in an Oxford House—a self-run, self-supported recovery house that meets the requirements

¹⁴ The Seattle Times, April 4, 1994, *Oxford House: Sober To Stay*.

or the recovery house provision of the Anti-Drug Abuse Act of 1988. 42 U.S.C. 300x-25.

The City of Edmonds' Community Development Code (ECDC) has a definition of "family" which includes "a group of five or fewer persons who are not related. . . ." ECDC § 21.30.010. Clearly, absent the FHAA, the eight to twelve residents of Oxford House-Edmonds could not lawfully reside in a dwelling zoned for single family residence. *Village of Belle Terre v. Boraas*, 416 U.S. 1, 94 S. Ct. 1536 (1974). However, unlike the unrelated individuals in the *Belle Terre Case*, the residents of Oxford House-Edmonds are all recovering alcoholics and drug addicts and fall within the protected class of "handicap" defined in § 802 of the FHAA. 42 U.S.C. 3602(h).

This Court in *Village of Euclid, Ohio v. Amber Realty Co.*, 272 U.S. 365 (1926), considered local single family zoning for the first time in the nation's history and found that it was constitutional. Mr. Justice Southerland, in writing the opinion for the court, noted that:

Such regulations are sustained, under the complex conditions of our day, for reasons analogous to those which justify traffic regulations, which, before the advent of automobiles and rapid transit railways, would have been condemned as fatally arbitrary and unreasonable. And in this there is no inconsistency, for, while the meaning of constitutional guaranties never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming with the field of their operation. In a changing world it is impossible that it should be otherwise. *Id.* at 387.

It is within this context of a "changing world" that Congress passed and President Reagan signed the FHAA. Changes in legislation affecting the treatment of the handicapped, including alcoholics and drug addicts reflects changing knowledge about the nature of the handicap and changes in society. The status provided handicapped in-

dividuals with respect to housing today is considerably different from just thirty or forty years ago. In the nineteen-fifties, the handicapped—whether mentally impaired, alcoholics or drug addicts—were segregated and incarcerated as a matter of public policy. Beginning with the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 77 Stat. 282 (1963)¹⁵ the nation changed its policy with respect to treatment of the handicapped. More recently, in § 1925 of the ADAMHA Reorganization Act of 1992, Pub. L. 102-321, 42 U.S.C. 300x-25, Congress changed the number of recovering individuals required to live in a self-run, self-supported recovery home to be eligible for a start-up loan from four (4) to six (6) presumably because the larger number of individuals made such a recovery home function better.

The Ninth Circuit Court correctly found that the City of Edmonds could not exclude groups of handicapped individuals living in an Oxford House by limiting the number of unrelated individuals who could live in an area zoned for single family dwellings.

The central issue in the case revolves around whether the following exemption in the Act is interpreted broadly or narrowly:

Nothing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling. 42 U.S.C. § 3607 (b)(1).

The Court first looks to the plain meaning of the provision and determines that it can be either interpreted broadly as the City of Edmonds argues, or narrowly, as the respondents argue. It then looks to the legislative history of which there is only one Committee Report—

¹⁵ Repealed by the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 902(e) (2) (B), 95 Stat. 537, 560.

the Judiciary Committee of the House of Representatives—H.R. Rep. No. 711, 100th Cong., 2d Sess. 24 (1988). That report is crystal clear.

These provisions are not intended to limit the applicability of any reasonable local, State, or Federal restrictions on the maximum number of occupants permitted to occupy a dwelling unit. *A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit.* Reasonable limitations by governments would be allowed to continue, *as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.* (emphasis added)

Unlike some legislation which generates reports from several legislative committees as well as a Committee on Conference between the House and the Senate, this legislation has only the report by the House Judiciary Committee. It provides a reasonable explanation of what is intended by the exemption for restrictions on the maximum number of occupants; i.e., number of occupants per unit “based on a minimum number of square feet in the unit or the sleeping areas of the unit.” Not only does the example in the House Report show how to apply the limitation to the maximum number of individuals permitted to occupy a dwelling, but the report language specifies that limitations on the maximum number of occupants would be allowed “as long as they were applied to all occupants and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status.”

The City of Edmonds in its Petitioner’s brief argues that the decisions of the Supreme Court afford the family special status under the Constitution. We agree. However, the accommodation of a group of recovering individuals living together in order to stay clean and sober

does not adversely impact a neighborhood. Neither does it open the door to group homes for those who are not handicapped. A local jurisdiction can still limit the number of unrelated "non-handicapped" individuals who can occupy a dwelling in an area zoned for single family dwellings. *Village of Belle Terre v. Borass*, 416 U.S. 1 (1974).

Petitioner City of Edmonds describes the underlying reason that areas zoned for single family dwellings provide the environment to enhance recovery and mutual support when it quotes Justice Douglas to describe such zones:

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land-use project addressed to family needs. . . . The police power is not confined to the elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people. *Belle Terre*, 416 U.S. at 9.

What group of individuals more need to live in a zone "where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people" than those handicapped, like the ten to twelve men in Oxford House-Edmonds, who want to change their lifestyles by living together in an alcohol and drug-free environment?

CONCLUSION

Alcohol abuse and dependence (i.e. alcoholism) are serious problems that affect about 10 percent of adult Americans.¹⁶ While the railway labor organizations have successfully worked with railroad management to address the problem within the industry, the problem throughout society remains large. Establishment of Oxford Houses throughout the country in safe single family neighborhoods can provide a valuable resource for successful recovery from alcoholism and drug addiction. For the reasons, set forth above, *amici curiae* urge this Court to affirm the decision of the Court of Appeals below.

Respectfully submitted,

LAWRENCE M. MANN
ALPER & MANN, PC
400 North Capital Street, N.W.
Suite 851
Washington, D.C. 20001
(202) 298-9191
Counsel for Amici Curiae

¹⁶ *Seventh Special Report to the U.S. Congress on Alcohol and Health From the Secretary of Health and Human Services*, January, 1990, p. xxi.

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IN THE
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OCTOBER TERM, 1994

CITY OF EDMONDS,

Petitioner,

v.

WASHINGTON STATE BUILDING CODE
COUNCIL, ET AL.

On Writ of Certiorari to the United States
Court of Appeals for the Ninth Circuit

BRIEF FOR AMERICAN ASSOCIATION ON MENTAL
RETARDATION AND OTHER GROUPS LISTED ON INSIDE
COVER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel:

LEONARD S. RUBENSTEIN
IRA A. BURNIM
HAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W.
Washington, D.C. 20005
(202) 467-5730

LOIS G. WILLIAMS*
JERROLD J. GANZFRIED
GREGG A. HAND
ALICE M. CROOK
ELLEN S. WINTER
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

*Counsel of Record

Counsel for Amici Curiae
AMERICAN ASSOCIATION ON
MENTAL RETARDATION
AND GROUPS LISTED ON
INSIDE COVER

BEST AVAILABLE COPY

AMICI CURIAE

Advocacy, Inc.
American Association on Mental Retardation
American Counseling Association
American Network of Community Options and
Resources
The Arc
Arc-Allegheny
The Arc of Pennsylvania
Autism National Committee, Inc.
Autism Society of America
California Alliance for the Mentally Ill
Center for Public Representation
Disability Rights Education and Defense Fund, Inc.
Disability Rights in Voter Empowerment
The Joseph P. Kennedy, Jr. Foundation
Legal Action Center
National Alliance for the Mentally Ill
National Association of People With AIDS
National Association of Protection & Advocacy
Systems
National Association of State Mental Health Program
Directors
National Community Mental Healthcare Council
National Mental Health Association
The National Organization for Rare Disorders
National Parent Network on Disabilities
New York Lawyers for the Public Interest, Inc.
Phoenix House
Spina Bifida Association of America
Sunrise Terrace, Inc.
World Institute on Disability

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-23

CITY OF EDMONDS,
Petitioner,

v.

**WASHINGTON STATE BUILDING CODE
COUNCIL, ET AL.**

**On Writ of Certiorari to the United States
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**BRIEF FOR AMERICAN ASSOCIATION ON MENTAL
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COVER AS AMICI CURIAE IN SUPPORT OF RESPONDENTS**

INTEREST OF AMICI CURIAE

Pursuant to Supreme Court Rule 37, *amici curiae* respectfully submit this brief in support of respondents Oxford House, Inc. and the United States. Consent to the filing of this brief has been granted by counsel for all parties and letters indicating such consent have been filed with the Clerk of this Court.

Amici curiae are professional provider and advocacy organizations dedicated to protecting the rights of and providing services to people with disabilities.¹ *Amici* believe that eliminating discrimination requires striking down local exclusionary zoning ordinances that limit housing options for people with disabilities. Restrictive laws, such as that at

¹ The interest of each amicus is fully set forth in Appendix A.

issue in this case, are not exempt from scrutiny under federal housing laws.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Fair Housing Amendments Act of 1988 ("FHAA") broadly protects "individuals with handicaps," or disabilities, against housing discrimination. 42 U.S.C. § 3602(h) (1988). To remedy a long and well-documented history of segregation and discrimination, Congress emphatically required equal opportunity in housing for persons with disabilities. 42 U.S.C. § 3601 (1988); see H.R. Rep. No. 711, 100th Cong., 2d Sess. 13 [hereinafter "H. R. Rep. at ___"]. The FHAA outlaws overt discriminatory conduct as well as facially neutral rules and regulations on health, safety, and land use application, including zoning decisions and practices, that limit the ability of individuals with disabilities to live together in the residence and community of their choice. H. R. Rep. at 24. Congress recognized that rules, policies, and laws might have to be altered, waived, or abandoned so that persons with disabilities might enjoy equal access and opportunity. *Id.* at 25. Among the many barriers to equal housing opportunity for people with disabilities are zoning limitations on congregate living arrangements.

Oxford House residents, in recovery from drug or alcohol abuse, are among those protected by the FHAA. They choose to live together democratically in safe residential areas, which are essential to their continued recovery. (Pet. App. 8a-9a.) The City of Edmonds' zoning law, by restricting the number of unrelated people who may live in a single-family home, significantly limits the housing opportunities not just for persons in recovery, but for persons with all manner of disability: mental illness, mental retardation and other developmental disabilities, physical disability and AIDS and other disabling diseases.

The court of appeals correctly determined that the City of Edmond's zoning restriction is not exempt from the FHAA; Congress intended to exempt only those maximum occupancy restrictions that apply to *all* occupants, not solely unrelated occupants. Exempting the City's restriction would frustrate the FHAA's purpose to outlaw zoning practices

against people with disabilities. Congress enacted the FHAA to eradicate persistent discrimination against people with disabilities. The FHAA and other laws enacted by Congress embrace the national policy of normalization, promoting community integration and residential living for people with disabilities. Community integration has proven to be beneficial to both the disabled individual and the community. This movement toward community integration has created a large unmet need for community housing options. Through the FHAA, Congress sought to remove existing barriers to community integration, such as community prejudices and restrictive zoning ordinances, which exacerbate this unmet need. Consequently, *amici* ask the Court to affirm the decision below.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT THE CITY OF EDMOND'S ZONING ORDINANCE IS NOT EXEMPT FROM THE FHAA

The City's zoning code permits families of both related and unrelated persons to live in single-family dwellings. City of Edmonds, Wash. Comm. Dev. Code ("ECDC") § 21.30.010. Related persons may live together in unlimited numbers, except by a square footage standard prescribed by the Uniform Housing Code.² (Pet. Br. at 7.) But unrelated persons living together, although recognized as a "family" under the code, are permitted only in groups of five or fewer. ECDC § 21.30.010. (JA 106-07.) This limitation prevented Oxford House from establishing a family unit for ten to twelve disabled persons in a large, six-bedroom house, which the owner had chosen to rent to Oxford House. (JA 106.)

Persons in recovery, and others with disabilities, often choose to live together in areas zoned for single families. Congregate or "group" homes generally consist of a small number of individuals with disabilities (two to

² The Code requires that sleeping rooms have at least 70 square feet if occupied by two persons, and 50 additional square feet for each occupant in excess of two. UHC § 503(b) (1988). Pet. App. 21a.

approximately twelve) who live in a single-family home and interact as a single household,³ and offer one kind of opportunity for people with disabilities to return to, or remain in, community life within a supportive, family atmosphere. These and other community living arrangements are vital to the integration into the community of persons with disabilities, and often have, as they do for Oxford House residents, therapeutic value. (See *infra* p. 16).

Because Oxford House "must have 6 or more residents to ensure financial self-sufficiency, to provide a supportive atmosphere for successful recovery, and to comply with federal requirements for the receipt of state start-up loans," the effect of the City's law is to bar Oxford House from any single-family residential zone in the City. (JA 107.) See, e.g., *Oxford House-Evergreen v. City of Plainfield*, 769 F. Supp. 1329, 1344 (D.N.J. 1991). The City asserts that its zoning law does not violate the FHAA because it is exempt under 42 U.S.C. § 3607(b)(1) (1988) as a restriction on "the maximum number of occupants permitted to occupy a dwelling."⁴

The court of appeals correctly held that the City's zoning restriction was not an exempt maximum occupancy restriction. A law does not restrict occupancy, the court held, unless it applies to "all occupants, whether related or not." (Pet. App. 17a.)⁵ This includes, for example, restrictions limiting a two-bedroom apartment to four occupants; a four-bedroom house to eight occupants; an apartment building to 300 occupants. Many other settings

³ Daniel Lauber, *Report on Houston's Interim Regulatory and Zoning Ordinance Proposals for Group Homes, Halfway Houses, Hospices, Emergency Shelters, and Social Service Facilities* 8 (Aug. 18, 1992); Matthew B. Bogin, *Group Homes for People with Handicaps: Recent Developments in the Law*, 5 W. New Eng. L. Rev. 423 (1983).

⁴ The exemption, labeled "numbers of occupants," provides: "Nothing in this subchapter limits the applicability of any reasonable local, State or Federal restrictions regarding the maximum number of occupants permitted to occupy a dwelling." 42 U.S.C. § 3607(b)(1) (1988).

⁵ See also *Oxford House-C v. City of St. Louis*, 843 F. Supp. 1556, 1573-74 (E.D. Mo. 1994); but see *Elliott v. City of Athens*, 960 F.2d 975, 981-83 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992), discussed *infra* at page 8.

also have genuine maximum occupancy limits: elevators; restaurants; airplanes. An occupancy limit that applies to some, but not all, occupants of certain types of dwellings plainly does not regulate *maximum* occupancy.

In fact, the City *does* regulate maximum occupancy in single-family dwellings, through its housing code square footage requirements, which regulate density, health and safety. UHC § 503 (1991). This code applies to related and unrelated occupants and, if it is otherwise reasonable, would be exempt from the FHAA under section 3607(b)(1).⁶

However, the City's zoning law limits unrelated family members to five. This law has nothing to do with overcrowding or health or safety. Indeed, the City has stipulated that eight to twelve occupants in the Oxford House dwelling would have no greater impact on the City's services and infrastructure than a related family of equal size. (JA 110.) Such laws restricting unrelated families necessarily discriminate against people with disabilities, who make up large numbers of the population barred from living together as families in single-family dwellings.

The City's definition of "family" in its zoning restriction is ambiguous and, if uniformly enforced, would have incomprehensible results. The restriction, for example, might prohibit a family of six from hiring live-in, unrelated assistants to care for a disabled family member, since there would be more than five residents in the house, not all of whom would be related. Similarly, the City's restriction would prevent six unrelated elderly, long-time City residents from living together as a supportive group in one house in their own community.

As the court of appeals noted, interpreting the FHAA to exempt the City's restriction would frustrate the FHAA's

⁶ "A number of jurisdictions limit the number of occupants per unit based on a minimum number of square feet in the unit or the sleeping areas of the unit. Reasonable limitations by governments would be allowed to continue, as long as they were applied to all occupants, and did not operate to discriminate on the basis of race, color, religion, sex, national origin, handicap or familial status." H. R. Rep. at 31.

purpose to prohibit discriminatory zoning practices against people with disabilities.⁷ (Pet. App. 26a.) Zoning restrictions, whether explicitly discriminatory or facially neutral, that operate to exclude group homes for people with disabilities, or limit their ability to live in the residence and community of their choice cannot survive under the FHAA. H.R. Rep at 24.⁸ State and local governments that use their authority to "restrict the ability of individuals with handicaps to live in communities," by imposing health, safety or land-use requirements on "congregate living arrangements among non-related people with disabilities," violate the law. Because the same requirements "are not imposed on families and groups of similar size of other unrelated people, [they] have the effect of discriminating against persons with disabilities." *Id.* at 23.⁹

⁷ See also *Horizon House Developmental Servs. v. Township of Upper Southampton*, 804 F. Supp. 683, 695-97 (E.D. Pa. 1992), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Easter Seal Soc'y v. Township of N. Bergen*, 798 F. Supp. 228, 234 (D.N.J. 1992); *Stewart B. McKinney Found. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197, 1211-16 (D. Conn. 1992); *United States v. Borough of Audubon*, 797 F. Supp. 353, 359-62 (D.N.J. 1991).

⁸ See *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) ("[T]he issue is not whether any house was made available . . . but whether she was denied the housing she desired on impermissible grounds.").

⁹ Following the lead of Congress, some states have enacted legislation specifically targeted at zoning laws that distinguish between related and unrelated persons, thereby restricting opportunities to live in group homes in residentially zoned areas. See Cal. Gov't Code § 12995, § 18(b) note (West Supp. 1995) (rendering unlawful zoning laws that make housing opportunities unavailable by discriminating on the basis of familial status, including opportunities to reside in group homes in residential areas). Interpreting these provisions, the court in *Broadmoor San Clemente Homeowners v. Nelson*, 30 Cal. Rptr. 2d 316, 321 (Cal. Ct. App. 4th Dist. 1994) held that the Legislature intended to bring California housing legislation in full compliance with federal law, which "prohibits enforcement of a restrictive covenant which has the effect of excluding group homes for the handicapped." The court added, "[t]he legislative intent expressed as part of the amendments, specifically refers to the desirability of making group housing for the disabled available in residential areas." *Id.* Mass. Gen. L., ch. 40A, § 3 (1979) ("[L]ocal land use and health and safety laws, . . . shall not discriminate against a disabled person. Imposition of . . . requirements on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size . . . shall constitute discrimination.").

Federal and state courts have recognized the FHAA's intent to eliminate barriers, even facially neutral ones, to community housing for people with disabilities.¹⁰ Time and again, courts have emphasized the congressional purpose to integrate disabled persons "into the mainstream of society." See, e.g., *United States v. Scott*, 788 F. Supp. 1555, 1561 n.5 (D. Kan. 1992).¹¹

Given these purposes, as well as the plain language of the FHAA, the City's restriction is not one involving "maximum occupancy" for a dwelling. The Ninth Circuit correctly recognized that the City's restriction cannot be reconciled with the "legislative history and purposes of the FHAA [which] demonstrate that Congress intended city zoning policies to reasonably accommodate handicapped persons." (Pet. App. 27a-28a.) Under the Act, people with disabilities constitute a protected class,¹² and discriminatory zoning ordinances against them must be reviewed with a higher level of scrutiny than applies under the rational basis test of the equal protection clause. *Horizon House*, 804 F. Supp. at 695 n.6; *United States v. Schulykill Township*, No. 90-

¹⁰ See, e.g., *City of St. Louis*, 843 F. Supp. at 1579; *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285, 1301 (D. Md. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450, 465 (D.N.J. 1992).

¹¹ See also *Deep E. Tex. Regional Mental Health & Mental Retardation Servs. v. Kinnear*, 877 S.W.2d 550, 555 (Tex. App. — Beaumont 1994) (stating that "[a] cardinal purpose of the remedial, rehabilitative statutes [FHAA and ADA] is to surround the citizens of Texas who suffer from mental impairment with a residential family structure in his or her own familiar community"); *Rhodes v. Palmetto Pathway Homes*, 400 S.E.2d 484, 486 (S.C. 1991) ("The Fair Housing Amendments Act of 1988 articulates the public policy of the United States as being to encourage and support handicapped persons' right to live in a group home in the community of their choice.").

¹² Congress has the power to statutorily confer greater rights than those afforded by the Constitution. See *City of Rome v. United States*, 446 U.S. 156, 177-78 (1980); *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976).

2165, 1990 U.S. Dist. LEXIS 15555, at *18 n.10 (E.D. Pa. Nov. 16, 1990).

In contrast, the Eleventh Circuit in *Elliott v. City of Athens*, 960 F.2d 975 (11th Cir.), cert. denied, 113 S. Ct. 376 (1992), merely applied this Court's constitutional precedents, under which a zoning ordinance that discriminated against disabled persons passed muster if it was not arbitrary, and if it bore a rational relation to a permissible state objective. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974). In doing so the Eleventh Circuit failed to appreciate that the passage of the FHAA had rendered the constitutional analysis inappropriate for persons with disabilities. It also ignored the overwhelming evidence that Congress intended precisely to reach zoning rules and practices, well-intentioned or not, that prevent people with disabilities from living in communities in a way compatible with their own needs. Judge Kravitch, in dissent, was correct: the court's result "cannot be reconciled with either the plain words of the statute or its legislative history." 960 F.2d at 985.

Because the City of Edmonds' restriction deprives people with disabilities of equal housing opportunity, the City must reasonably accommodate Oxford House residents. The "reasonable accommodation" requirement imposes an affirmative duty on municipalities to adjust their "traditional rules or practices if necessary to permit a person with handicaps an equal opportunity to use and enjoy a dwelling." H.R. Rep. at 25. Numerous courts have interpreted this requirement to mean that municipalities must change, waive or make exceptions to their zoning rules to afford people with disabilities equal opportunity to

housing.¹³ The City could accommodate Oxford House either by changing its law, or by simply waiving the five-unrelated-person limit.

II. THE FHAA MIRRORS NATIONAL RECOGNITION THAT PEOPLE WITH DISABILITIES NEED TO BE INTEGRATED INTO THE COMMUNITY

Congress enacted the FHAA in 1988, against the backdrop of a considerable body of knowledge about the history and nature of discrimination against persons with disabilities. See, e.g., *Alexander v. Choate*, 469 U.S. 287, 295 (1985). Whether in independent or assisted-living arrangements in apartments or single family dwellings, or in congregate or group home settings with peers, living in a community with a mix of people, both non-disabled and disabled, is now accepted to be the healthiest and most advantageous housing for persons with disabilities. It is unquestionably what people with disabilities want. It is also generally regarded by experts as the most advantageous arrangement for society and the community.

A. History of Prejudice and Discrimination Against People With Disabilities

Beginning in the late 19th century and continuing into the middle of this century, the official policy of the United States was to segregate people with disabilities from "normal" society.¹⁴ Although this policy has abated

¹³ See, e.g., *Township of Cherry Hill*, 799 F. Supp. at 462-63; *Horizon House*, 804 F. Supp. 699-700; *United States v. City of Taylor*, 798 F. Supp. 442, 447-48 (E.D. Mich. 1992); *Easter Seal Soc'y v. Township of N. Bergen*, 798 F. Supp. 228 (D.N.J. 1992); *Stewart B. McKinney Found.*, 790 F. Supp. at 1221-22; *Parish of Jefferson v. Allied Health Care, Inc.*, No. 91-1199, 1992 U.S. Dist. LEXIS 9124, at *13-21 (E.D. La. June 10, 1992); *United States v. Village of Marshall*, 787 F. Supp. 872, 876-79 (W.D. Wis. 1992); *City of Plainfield*, 769 F. Supp. at 1344-45; *United States v. Puerto Rico*, 764 F. Supp. 220, 224 (D.P.R. 1991); *Devereux Found., Inc. v. O'Donnell*, No. 89-6134, 1990 U.S. Dist. LEXIS 11831, at *13 nn. 12-13 (E.D. Pa. Sept. 6, 1990).

¹⁴ See Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 Temp. L. Rev. 393, 399 (1991); Jonathan C. Drimmer, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 U.C.L.A. L. Rev. 1341, 1342 (June 1993); Stanley S. Herr, *Rights and Advocacy for Retarded*

somewhat, people with disabilities continue to be stigmatized and pitied, and continue to experience discrimination in all facets of life, including housing.

During the early 1900s, in virtually every state, people with disabilities, particularly children, were declared unfit for companionship, a blight on society, and "'a most baneful evil.'" Timothy M. Cook, *The Americans With Disabilities Act*, 64 Temp. L. Rev. at 400-01 (quoting various state laws and official state reports from the early part of this century). Those with severe disabilities were considered "'a defect . . . [that] wounds our citizenry a thousand times more than any plague.'" *Id.* More than half the states enacted eugenic sterilization and segregation laws to prevent the propagation of "degenerate offspring" and to isolate "inferior beings" from the rest of society. *See id.* at 401-03. Individuals with mental retardation, mental illness and other disabilities were viewed as "abnormal" and "dangerous."¹⁵ They were warehoused in large institutions and hospitals where they could be "treated" and "confined." The so-called experts and scientists of the day justified segregation based not only on the need to protect society from people with disabilities, but also on the beneficial effects of institutionalization. Segregating people with disabilities was considered "'consistent with a deep and abiding charity [that] . . . permits all to live under those circumstances best suited to

People 18-29 (1983); *City of Cleburne v. Cleburne Living Center*, 473 U.S. 423, 460-63 (1985) (Marshall, J., concurring in part and dissenting in part).

¹⁵ Justice Marshall recounted this history in the *City of Cleburne*:

Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in large degree for many, if not all, of our social problems." A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow.

473 U.S. at 461-62 (Marshall, J., concurring in part and dissenting in part) (footnote and citations omitted). *See generally* Timothy M. Cook, *The Americans With Disabilities Act*, 64 Temp. L. Rev. at 399-414 (describing nearly universal state segregation of persons with disabilities).

make each useful and happy.'" *Id.* at 406 (quoting C.S. Yoakum, *Care of the Feeble-minded and Insane in Texas*, Bull. U. Tex. 83 (Nov. 5, 1914)). The federal government fully concurred with these state policies. *Id.* at 401. Similarly benign rationale were used to justify racial segregation.

B. "Normalization" – The Principle Behind Community Integration

In the 1950s, professionals and policymakers recognized that a policy of segregation and institutionalization not only impeded the progress of those confined, but also violated basic notions of decency.¹⁶ A national policy of community living developed, based in part on the widespread recognition that people with disabilities are injured by unnecessary institutionalization and segregation. These injuries generally are attributed to the isolation of people from "the normal rhythm of daily routines of occupation, leisure, and personal life."¹⁷ Evidence has shown that motor learning skills, communication skills and general social competency of people are negatively affected by institutional settings.¹⁸

Accordingly, the concept of "normalization" – the idea that people with disabilities do better when they live as part of society rather than separate from it – has influenced national policy on disabilities for the past thirty years.¹⁹ The

¹⁶ Arlene S. Kanter, *A Home of One's Own: The Fair Housing Amendments Act of 1988 and Housing Discrimination Against People With Mental Disabilities*, 43 Am. U. L. Rev. 925, 929 (1994).

¹⁷ Bengt Nirje, *The Normalization Principle and its Human Management Implications*, in President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* 179, 186-87 (R. Kugel & W. Wolfensberger eds. 1969)).

¹⁸ Daniel Lauber, *Report on Houston's Interim Regulatory and Zoning Ordinance Proposals for Group Homes, Halfway Houses, Hospices, Emergency Shelters, and Social Service Facilities* at 6 (citing Jerri L. Phillips & Earl E. Balthazar, *Some Correlates of Language Deterioration in Severely and Profoundly Retarded Long-Term Institutionalized Residents*, 83 Am. J. Mental Deficiency 402-08 (1979)).

¹⁹ In 1963, President Kennedy announced a change of direction for the country by setting forth a national policy of community integration. The President declared that "[w]e must act . . . to retain in and return to the

core principle of normalization is that individuals with disabilities are entitled to the cultural opportunities, surroundings, experiences, risks, and associations enjoyed by people without disabilities. In housing, normalization means living in a normal size home in a residential neighborhood that offers opportunities for normal societal integration and interaction.²⁰ Living with a group of unrelated peers is one way that people with disabilities can enjoy the benefits of community living.

C. Development of National Policy of Community Living

1. Community Living

The national policy of normalization underlies a series of laws that encouraged and developed community living options. Congress took the first step in that direction by enacting the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963,²¹ which

community the mentally ill and mentally retarded [in order] to restore and revitalize their lives" President's Special Message to Congress on Mental Illness and Mental Retardation, 88th Cong., 1st Sess., reprinted in 1963 U.S.C.C.A.N. 1466, 1476-77.

²⁰ Justice Marshall explained the function and importance of group homes for people with mental disabilities, which applies equally to all other disabilities:

For retarded adults, this right [to establish a home] means living together in group homes, or as deinstitutionalization has progressed, group homes have become the primary means by which retarded adults can enter life in the community. . . . Excluding group homes deprives the retarded of much of what makes for human freedom and fulfillment — the ability to form bonds and take part in the life of a community.

City of Cleburne, 473 U.S. at 461 (Marshall, J., concurring in part and dissenting in part).

²¹ Pub. L. No. 88-164, 77 Stat. 282, *repealed by* Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, § 902(e)(2)(B), 95 Stat. 357, 560. The 1981 Act amends the Medicaid program to reimburse states for certain home or community-based services for people with mental disabilities as alternatives to institutions. The community services waiver provision of the Omnibus Budget Reconciliation Act of 1981, Pub. L. No. 97-35, §§ 2176, 2177 (a), 95 Stat. 357, 812-13 (codified at 42 U.S.C. § 1396n(c) (1988 & Supp. V 1993)), allows states to apply for a waiver of certain Medicaid requirements in order to offer home and community-based services. See also Social Services Amendments of 1974, Pub. L. No.

provided federal funding for mental health services in the community.

The Developmentally Disabled Assistance and Bill of Rights Act of 1975, Pub. L. No. 94-103, 89 Stat. 486, more specifically declared that "[t]he treatment, services, and habilitation for a person with developmental disabilities should be . . . provided in the setting that is least restrictive of the person's personal liberty." 89 Stat. at 502. Congress accompanied the Act with funding for community-based services, declaring that institutional care was, in most cases, "inappropriate and inhumane."²² In 1987, Congress amended the Act to state more forcefully the "national interest" of promoting the right and opportunity for people with developmental disabilities to be part of the community, "to make decisions for themselves and to live in typical homes and communities where they can exercise their full rights and responsibilities as citizens."²³

Congress continued to promote community living through funding initiatives that targeted the special needs of previously overlooked people. With the passage of the Anti-Drug Abuse Act of 1988, 42 U.S.C. §§ 300x-1 to -64 (1988 & Supp. V 1993), Congress endorsed residential group homes for recovering addicts and alcoholics. In 1990, Congress enacted the National Affordable Housing Act, which provides rental housing assistance and supportive services to homeless people with disabilities. *Id.* § 11403 (Supp. V 1993).

93-647, § 2001, 88 Stat. 2337 (codified at 42 U.S.C. § 1397 (1988)) (favoring community-based care over institutional care); Housing and Community Development Act of 1974, Pub. L. No. 93-383, § 210(b), 88 Stat. 633 (codified at 12 U.S.C. § 1701q(d)(4) (1988)) (amending Housing Act to include subsidies for construction of residential facilities for developmentally disabled persons).

²² H.R. Rep. No. 58, 94th Cong., 1st Sess. 15.

²³ 42 U.S.C. §§ 6000(a)(4) (1988), (a)(9) (Supp. V 1993) (emphasis added). Congress amended the Act again in 1990, emphasizing that one of the stated purposes of the Act was "to promote the inclusion of all persons with developmental disabilities, including persons with the most severe disabilities, in community life." *Id.* § 6009(b)(5) (Supp. V 1993).

The development of state policy promoting community living paralleled that of the federal government. States throughout the country adopted community integration programs for people with mental retardation and developmental disabilities.²⁴ Indeed, in the thirty-four year period from 1960 through 1993, twenty-seven states closed one or more large state mental retardation/developmental disability facilities.²⁵

2 Anti-Discrimination Laws

Federal and state recognition of a policy of community integration, standing alone, did not succeed in changing entrenched attitudes toward people with disabilities. The failure of the public to accept people with disabilities into various aspects of community life, due to stereotypes and prejudice, threatened to undermine the goals of integration.

The first federal law to prohibit discrimination against people with disabilities was the Rehabilitation Act of 1973, 29 U.S.C. §§ 701-796i (1988 & Supp. V 1993). The Act's stated purpose was to "develop and implement . . . comprehensive and coordinated programs of vocational rehabilitation and independent living, for individuals with handicaps in order

²⁴ See, e.g., Texas Mental Health and Mental Retardation Act of 1965, Tex. Rev. Civ. Stat., art. 5547-201-206, *repealed by* Acts 1991, ch. 76, § 19; Texas Mentally Retarded Persons Act of 1977, Tex. Rev. Civ. Stat., art. 5547-300, *repealed by* Acts 1991, ch. 76, § 19; N.Y. Mental Hyg. Law §§ 41.33, 41.34; 41.36 and 41.37 (McKinney 1988); Georgia Community Services Act for the Mentally Retarded, Ga. Code Ann. § 37-52 (Michie 1982). For example, the Georgia statute states: "The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities." See also Appendix B, *infra*, which provides a more complete listing of state statutes adopting policies of community residential living for people with disabilities.

²⁵ See David L. Braddock et al., *The State of the States in Developmental Disabilities* 12 (Paul H. Brooks Publishing Co.) (1990); Troy Managan et al., University of Minnesota, College of Education, *Residential Services for Persons with Mental Retardation and Related Conditions: Status and Trends Through 1993* 11-12, 19 (June 1994). The placement rate of persons with mental retardation and related conditions in all large state facilities declined from 115.8 per 100,000 of the general population in 1965 to 28.6 per 100,000 in 1993 — less than one-quarter of the 1965 placement rate. *Id.* at 13.

to maximize their . . . integration into the workplace and the community." *Id.* § 701 (1988). As this Court recognized in *School Board of Nassau County v. Arline*, Congress was concerned with "protecting [people with disabilities] against discrimination stemming not only from simple prejudice, but also from 'archaic attitudes and laws' and from 'the fact that the American people are simply unfamiliar and insensitive to the difficulties confront[ing] individuals with handicaps.'" 480 U.S. 273, 279 (1987).

States also began to confront widespread reliance on local zoning laws to exclude group homes for people with disabilities, by enacting preemptive laws limiting local discretion over zoning decisions affecting group homes. By 1987, thirty-four states had enacted legislation authorizing, to varying degrees, the location of group homes in residential areas.²⁶

In 1988, Congress enacted the FHAA, establishing a strong national policy prohibiting housing discrimination by requiring reasonable accommodation for the special housing needs of those with disabilities. Congress recognized that all groups of people with disabilities had suffered discrimination because of "prejudice and aversion — because they make non-handicapped people uncomfortable." H. R. Rep. at 18. Stereotypes and prejudice may no longer be used to deny "critically needed" housing to people with disabilities. "The right to be free from housing discrimination is essential to the goal of independent living." H.R. Rep. at 18.²⁷ The Act

²⁶ See Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled: A National Study*, 19 Urb. Law. 1, 18-20 (Winter 1987) (surveying preemption laws). The state preemption laws varied with regard to the disabilities they cover. Although virtually every state law covered group homes for peoples with developmental disabilities, only a portion covered people with mental illness. *Id.*

²⁷ Congress reiterated the goal of "provid[ing] a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" in all of its forms, including the practices of "isolat[ion] and segrega[tion]" with the passage of the

repudiates the use of stereotypes and ignorance, and mandates that people with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

Id. (footnote omitted). In sum, like the Rehabilitation Act of 1973, the FHAA "is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream." *Id.*

III. EXPERIENCE HAS DEMONSTRATED THE BENEFITS OF COMMUNITY INTEGRATION

There is now substantial evidence, certainly supported by the experience of all *amici curiae*, that when people with disabilities live in decent housing in community residential settings, they benefit significantly. It is also clear that the surrounding community benefits in a variety of ways.

A. Benefits of Community Living

People with disabilities can reap the benefits of community living in a variety of ways. Some live independently in the community. Others live in their own apartments or homes with support as needed from nearby or on-call staff. Some live in family care homes, with private homeowners who act as "surrogate parents" for one to six persons with disabilities. Others live in small intermediate care facilities, public or private, that provide twenty-four-hour care to persons with developmental disabilities and stabilized health problems. Barbara Wright, National Conference of State Legislatures, *What Legislators Need to*

American with Disabilities Act. 42 U.S.C. § 12101(a)(2), 12101(b)(1) (Supp. V 1993).

Know About Mental Retardation and Developmental Disabilities 7 (Feb. 1990). The group home, in which peers live together in a mutually supportive environment, is one model that is highly beneficial for certain groups of people with disabilities, like Oxford House residents.

The development of group homes for individuals in recovery became national policy with the passage of the Anti-Drug Abuse Act of 1988, which requires states to provide funds to start self-run, self-supporting homes that are alcohol and drug free. 42 U.S.C. § 300x-25 (Supp. V 1993). The law is based on the successful fifteen-year experience of the national network of self-help Oxford Houses.²⁸ All evidence indicates that the Oxford House model is extremely effective.²⁹

The location of a home in a residential neighborhood is critical to its success. A survey of group homes sponsored by the U.S. General Accounting Office in 1983 found that the most important siting factors were that the home be in a safe, stable neighborhood with a high percentage of single-family residences.³⁰ Residents in middle to higher income

²⁸ The legislation reflects Congress's view that "after detoxification and in-patient rehabilitation many [people] need to live in an alcohol and drug free environment for some time in order to avoid [a] relapse," that Oxford Houses "provide the kind of support necessary for [these] individuals," and that such housing can therefore provide "the missing link in recovery from addiction." 134 Cong. Rec. E3732, E3733 (daily ed. Nov. 10, 1988) (remarks of Rep. Madigan).

²⁹ One study surveying six Oxford Houses published in 1991 showed that while residents continued to live in Oxford House, their relapse rate was less than 10%; 80% viewed Oxford House as important to their continued sobriety. William H. Spillane & Dean Frederick Ahearn, Catholic University of America, *Final Report: Developmental Exploratory Study of Six Newly Formed Group Recovery Homes* 55 (Feb. 15, 1991). Similarly, a study of the New Jersey Oxford Houses showed that approximately 80% remained alcohol and drug free while living at Oxford House. J. Paul Molloy, Oxford House, Inc., *The New Jersey State Network of Oxford Houses* 25 (1992).

³⁰ U.S. General Accounting Office, *An Analysis of Zoning and Other Problems Affecting the Establishment of Group Homes for the Mentally Disabled* App. I at 8 (Aug. 17, 1983). The GAO Report found that most group homes for people with mental disabilities were single family, detached houses. *Id.* at 7-8.

communities have higher levels of social adjustment and community integration, suggesting a higher quality physical setting, and also provide more integrating services and resources.³¹ Not surprisingly, residents who are isolated in poor neighborhoods with high crime rates generally have little contact with their community.³² It likewise is difficult, if not impossible, to create a home in a commercial or industrial area.³³ For those with addictions, group homes located in single-family neighborhoods, away from liquor stores and illicit drug activity, play a "crucial role" in an individual's recovery by "promoting self-esteem, helping to create an incentive not to relapse." *Township of Cherry Hill*, 799 F. Supp. at 453.

The proven benefits of community living are not surprising. When people with disabilities live in the community, they are able to develop a meaningful life outside in the neighborhood--they attend movies, enjoy shops, take walks in parks, and visit friends.³⁴ The scientific

³¹ John T. Hull & Joy C. Thompson, *Factors Which Contribute to Normalization in Residential Facilities for the Mentally Ill*, *Community Mental Health J.* 107, 111 (Summer 1981); see also Frank Baker & Charlene Douglas, *Housing Environments and Community Adjustment of Severely Mentally Ill Persons*, 26 *Community Mental Health J.* 497, 503-04 (Dec. 1990) (A study examining relationships between the quality and appropriateness of housing environments and community adjustment of 729 deinstitutionalized severely mentally ill clients found that quality and appropriateness of housing environments significantly affect aspects of client's community adjustment outcomes over a nine-month period, including global level of functioning, degree of maladaptive behavior, and client's perceived quality of life); Mary Earls & Geoffrey Nelson, *The Relationship Between Long-Term Psychiatric Clients' Psychological Well-Being and Their Perceptions of Housing and Social Support*, 16 *Am. J. Community Psychol.* 279, 290-91 (1988) (study of 89 people between the ages of 18 and 65 who had been hospitalized for psychiatric problems at least twice showed that poor quality housing is strongly related to clients' perceptions of their psychological well-being).

³² Martin Jaffe & Thomas P. Smith, *Siting Group Homes for Developmentally Disabled Persons at 8* (citing Sylvia Bercovici, *American Ass'n on Mental Deficiency, Qualitative Methods and Cultural Perspectives in the Study of Deinstitutionalization*, Monograph 4 (R. Bruininks ed. 1981)).

³³ Daniel Lauber & Frank S. Bangs, Jr., *American Society of Planning Officials, Zoning for Family and Group Care Facilities* 8, 10 (Mar. 1974).

³⁴ See R. Horner et al., *Oregon Developmental Disabilities Office, An Activity Based Analysis of Deinstitutionalization: The Effects of Community Re-*

literature on mental retardation, for example, overwhelmingly shows that family-style community homes improve adaptive behavior; increase social participation, independence, and control over decisions; and improve the perceived quality of life. See Appendix C, *infra*. Similarly, group homes for people with HIV or AIDS can "literally extend lives by providing a safe environment, giving residents an opportunity to address their needs, and facilitating the delivery of health care and other services."³⁵ In fact, numerous studies have disproved one of the most common misperceptions -- that people with very limited functional abilities are not suitable for the community.³⁶

Community living also provides a critical alternative to hospital-based care, and even to family care by relatives, especially for those with severe mental illness who require assisted living.³⁷ Studies overwhelmingly show that community-based treatment is more effective than hospital-based treatment in helping people with psychiatric

Entry on the Lives of Residents Leaving Oregon's Fairview Training Center (1988) (cited in Timothy M. Cook, *The Americans With Disabilities Act*, 64 *Temp. L. Rev.* at 450); James W. Conroy & Valerie J. Bradley, Temple University Developmental Disabilities Center, Philadelphia, Human Services Research Institute, Boston, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (Mar. 1985).

³⁵ Howard Burchman & David Terrio, *Review of Breaking New Ground*, 8 *AIDS & Pub. Pol'y J.* at 196.

³⁶ James W. Conroy et al., *Connecticut Department of Mental Retardation, 1990 Results of the CARC v. Thorne Longitudinal Study* (Report No. 10) 41 (Jan. 1991); James W. Conroy & Valerie J. Bradley, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis*. See Timothy M. Cook, *The Americans With Disabilities Act*, 64 *Temp. L. Rev.* at 444 (citing James W. Conroy et al., *A Matched Comparison of the Developmental Growth of Institutionalized and Deinstitutionalized Mentally Retarded Clients*, 86 *Am. J. Mental Deficiency* 581 (1982)).

³⁷ Francine Cournos, *The Impact of Environmental Factors on Outcome in Residential Programs*, 38 *Hosp. & Community Psychiatry* 848, 849 (Aug. 1987) (discussing that residential programs are important because patient and family may wish to separate from each other, or they may be unable to live together).

disabilities become employed, gain re-entry into the community, and reduce the use of medication.³⁸

As Congress recognized, community living substantially furthers the national policy of normalization by enabling people with disabilities to enter or remain in community housing. The substantial benefits of such housing are measurable by sophisticated surveys and by simple expressions of happiness. Although the needs from one disability group to another differ, the basic concept of establishing a small home in a residential neighborhood where its residents can live what society perceives as a "normal" everyday life, has proven successful time and again.

B. Benefit to the Community

It would be a mistake to assume that normal housing for people with disabilities benefits only the residents; the community also benefits. Interaction increases social acceptance, which leads to greater tolerance for diversity by those without disabilities.³⁹ The positive community impact of integration was an intended statutory objective, as stated by one of the FHAA's sponsors: "the attitudes, stereotypes, and misconceptions of the rest of society about people with disabilities are not going to change until those of us without disabilities have the opportunity to be around people

³⁸ Paul J. Carling, *Major Mental Illness, Housing, and Supports*, 45 Am. Psych. 969, 971 (Aug. 1990) (citing C.A. Kiesler, *Mental Hospitals and Alternative Care: Noninstitutionalization as Potential Public Policy for Mental Patients*, 37 Am. Psychologist 349-60 (1982); P. Braun et al., *Overview: Deinstitutionalization of Psychiatric Patients - A Critical Review of Outcome Studies*, 138 Am. J. Psychiatry 736-49 (1981); D. Dellario & W. Anthony, *On the Relative Effectiveness of Institutional and Alternative Placements of the Psychiatrically Disabled*, 37 J. Soc. Issues 21-33 (1981)).

³⁹ See Timothy M. Cook, *The Americans With Disabilities Act*, 64 Temp. L. Rev. at 448-49 (citing Susan M. McHale & Rune J. Simeonsson, *Effects of Interaction on Nonhandicapped Children's Attitudes Toward Autistic Children*, 85 Am. J. Mental Deficiency 18 (1980)).

with them -- as classmates, as colleagues, and as neighbors."⁴⁰

Notably, integration resulting in large part from the FHAA has helped to change public attitudes in those immediate neighborhoods where group homes have located. Neighbors see over time that their fears of a decline in property values, increase in crime, or negative impact on the character of the neighborhood, were unjustified.⁴¹ For example, of the thirty-six percent of the neighbors who opposed five group homes for the mentally ill before they were built on Long Island, only two percent continued to oppose the homes two to three years later.⁴²

Effective housing for former addicts and alcoholics, enabling them to be productive members of society, also benefits the public fisc by increasing taxable earnings, and by reducing crime, birth defects, broken families, and hospitalization.⁴³ Moreover, some community living

⁴⁰ 134 Cong. Rec. S10,552 (daily ed. Aug. 2, 1988) (statement of Sen. Weicker) (emphasis added); see also *Baxter v. City of Belleville*, 720 F. Supp. 720, 734-35 (S.D. Ill. 1989) ("The Court finds that the public interest can best be served if discriminatory actions based on irrational fears, piecemeal information and 'pernicious mythologies' are restrained.").

⁴¹ See Tom Pelton, *Federal Law is Letting Group Homes Tiptoe into Town; New Rules Open Door for Mentally Disabled*, Chicago Tribune, Oct. 4, 1994, at 1 (one former opponent of a group home for individuals with mental illness admitted, "[i]t's worked out real well. They've improved the property, and we haven't had any incidents."); Michael Winerip, *A Home for Anthony*, N.Y. Times, June 5, 1994, at 50 (Glen Cove's Mayor, who fought hard to block a house for people with mental illness, acknowledged, "the fact of the matter is, it hasn't been a problem"). In one community, a high school club "adopted" a group home near the school and got involved in helping the residents of the house. Peter Marks, *Unwelcomed Neighbors Long Island a Leader in Thwarting Group Homes for Mentally Ill*, Newsday, May 20, 1990, at 5.

⁴² Theresa Tighe & Melanie Robinson, *Group Home for Alzheimer's Patients is Hard Sell; Neighbors in Ballwin Protest Despite Owners' Assurances*, St. Louis Post-Dispatch, Sept. 9, 1994, at 1D.

⁴³ Thirty-one percent of Oxford House residents surveyed in 1990 reported being homeless at the time they came to live in Oxford House; 77% of the residents surveyed reported being homeless at some time during their lives. William H. Spillane & Dean Frederick Ahearn, *Final Report: Developmental Exploratory Study* at 33, 37.

arrangements result in lower health care costs for many people with disabilities. For example, community living arrangements for the frail elderly or people with HIV/AIDS can replace hospital or nursing home care and reduce greatly the corresponding costs of such care.

In sum, all available evidence shows that community living is good for persons with disabilities and for the community and society at large as well.

IV. THE FHAA WAS INTENDED TO ELIMINATE BARRIERS TO COMMUNITY INTEGRATION

The shift from institutionalization to normalization and community integration has created a growing need for community housing opportunities, including group homes. Community prejudices and exclusionary zoning practices still operate to keep such housing in short supply.

A. The Need for Housing for People with Disabilities

While availability of housing for people with disabilities (both state-operated and private) has increased substantially over time (especially for those with developmental disabilities), there still is not nearly enough to meet existing needs. Indeed, a recent HUD report found that nonelderly people with disabilities had very high rates of unmet housing need (47%), and are most likely to live in severely inadequate housing.⁴⁴ A study conducted from 1990-92 by the Center on Residential Services and Community Living reported that 60,876 people with mental

⁴⁴ U.S. Dep't of Housing & Urban Development, *Worst Case Needs for Housing Assistance in the United States in 1990 and 1991. A Report to Congress* 13, 44 (June 1994). Because data only includes individuals who receive SSI, the Report acknowledged that it probably undercounts the number of households with disabled individuals.

retardation/developmental disabilities in thirty-seven states were waiting for residential services.⁴⁵

For people with mental illness, the need is equally great. For example, in 1950, there were roughly 90,000 people living in New York's state mental hospitals compared to 10,000 today. Yet, the 80,000 hospital beds that were eliminated have been replaced by just 12,536 state-financed group home and apartment beds.⁴⁶ Due to the lack of appropriate housing, as many as one-third of inpatients remain in psychiatric hospitals unnecessarily; others cycle through emergency rooms and hospitals in costly and often inappropriate stays.⁴⁷ The unavailability of appropriate community housing also results in unresolved psychiatric problems, which, in turn, can lead to homelessness.⁴⁸ The state of homelessness may exacerbate the symptoms of mental illness—further distancing a person from the chance of a decent life.⁴⁹

The lack of adequate housing in a drug and alcohol-free environment for individuals recovering from substance abuse is a "major, major problem." *Township of Cherry Hill*, 799 F. Supp. at 456 n.12. The executive director of the New Jersey Governor's Council on Alcoholism and Drug Abuse testified that, "for alcoholics and drug addicts, finding adequate housing in a drug and alcohol-free neighborhood

⁴⁵ University of Minnesota, College of Education, *Policy Research Brief. Adults with Mental Retardation and Other Developmental Disabilities Waiting for Community-Based Services in the U.S.* 4 (Aug. 1992).

⁴⁶ Michael Winerip, *A Home for Anthony*, N.Y. Times, June 5, 1994, at 50.

⁴⁷ Paul J. Carling, *Major Mental Illness, Housing, and Supports*, 45 Am. Psychol. 969.

⁴⁸ Studies show that one out of every three homeless people in the United States suffer from a severe mental illness, such as schizophrenia or manic-depressive illness. Alan I. Leshner, Report of the Federal Task Force on Homelessness and Severe Mental Illness, *Outcasts on Main Street* 1 (1992) (citing R.C. Tessler & D.L. Dennis, National Institute of Mental Health, *A Synthesis of NIMH-Funded Research Concerning Persons Who Are Homeless and Mentally Ill* (1989)).

⁴⁹ Arlene S. Kanter, *Homeless Mentally Ill People: No Longer Out of Sight and Out of Mind*, 3 N.Y.L. Sch. J. Hum. Rts. Annual 331, 333 (Spring 1986).

after a rehabilitation program is more difficult than getting into the rehabilitation program itself." *Id.*

The lack of affordable and appropriate housing is likewise an acute crisis for people living with AIDS. It is estimated that from one-third to one-half of all people with AIDS are either homeless or in imminent danger of becoming so.⁵⁰ Approximately thirty percent of all people with HIV disease in acute care hospitals are there because there is no appropriate community housing or program for them.⁵¹ In short, the housing needs of people with disabilities are not being met.

B. Community Prejudices

A number of factors, such as increasing demand and limited state and federal funding, contribute to the unmet housing needs. But community opposition and restrictive zoning ordinances play a central role in preventing people with disabilities from living in the community.⁵² As the American Psychiatric Association's task force on homelessness concluded:

Since the beginning of deinstitutionalization, there has been a great deal of resistance to the development of community residences for the mentally disabled. Many citizens do not oppose the theory of community care for the mentally ill, but when faced with the reality, they often oppose

⁵⁰ Howard Burchman & David Terrio, *Review of Breaking New Ground: Developing Innovative AIDS Care Residences*, 8 AIDS & Pub. Pol'y J. 195, 196 (1993) (citing National Commission on AIDS, *Housing and the HIV/AIDS Epidemic* 7 (1993)).

⁵¹ *Id.*; see also Stewart B. McKinney Found., 790 F. Supp. at 1202.

⁵² In fact, social scientists have developed a hierarchy of disabilities, ranking them in order of their social acceptance. See Michael Dear, Robert Wood Johnson Foundation, *Gaining Community Acceptance* 16-20 (1990). Not surprisingly, recovered substance abusers, like the occupants of Oxford House, and people with AIDS, have been found to have the least socially acceptable disabilities. The level of outcry against group homes for persons with disabilities correlates directly to the social acceptability of the resident population. *Id.*

the siting of facilities near their own business or residence.⁵³

This attitude has been commonly referred to as "NIMBY" or "not in my backyard." As the nation moved toward deinstitutionalization, advocates for community integration encountered NIMBY attitudes when people with any kind of disability attempted to site group homes in a community.⁵⁴

Opposition to community integration typically has centered around three general issues. First, communities argue that integration will cause property values to decrease. Second, they fear that people living in such residences will commit crimes and be dangerous and unpredictable. Finally, communities assert that group homes will not be maintained properly and that residents will be dirty or unkempt and will engage in antisocial behavior such as loitering, public urination or defecation, and aggressive panhandling.⁵⁵ Such aberrant behavior, communities argue, will unalterably change the character of their quiet residential neighborhood.

Study after study has conclusively proven that each of these fears is unfounded.⁵⁶ There is no evidence that

⁵³ Nora Richter Greer, *The Search for Shelter* 37 (1986) (quoting American Psychiatric Ass'n, *A Task Force Report of the American Psychiatric Ass'n. Homeless Mentally Ill* (1984)).

⁵⁴ See generally Carol K. Sigelman et al., *Community Reactions to Deinstitutionalization*, 45 J. Rehabilitation 52, 52 (Jan./Feb./Mar. 1979); Alan I. Leshner, *Outcasts on Main Street* at 24-26.

⁵⁵ Cindy Lee Soper, Note, *The Fair Housing Act Amendments of 1988: New Zoning Rules for Group Homes for the Handicapped*, 37 St. Louis U. L.J. 1033, 1041 (Summer 1993); Daniel Lauber & Frank S. Bangs, Jr., *American Society of Planning Officials, Zoning for Family and Group Care Facilities* at 8-10; Michael Dear, *Gaining Community Acceptance* at 11-12; Robert L. Schonfeld, "Five-Hundred-Year Flood Plains" and Other Unconstitutional Challenges to the Establishment of Community Residences for the Mentally Retarded, 16 Fordham Urb. L.J. 1, 8 (1988); Disability Law Center, Inc., *The Right of Persons with Disabilities to be Free from Discrimination in Housing Pursuant to the Federal Fair Housing Law and Other Federal Statutes* 92-94 (June 1990).

⁵⁶ Community Residences Information Services ("CRISP"), "There Goes the Neighborhood . . ." *A Summary of Studies Addressing the Most Often Expressed Fears About the Effects of Group Homes on Neighborhoods in Which*

property values surrounding group homes decrease or that crime increases.⁵⁷ Indeed, group homes tend to be maintained as well as, or better than, other residences in the neighborhood.⁵⁸ Nonetheless, vocal opposition has pressured local zoning officials to block proposed group homes and has scared away group home residents.⁵⁹ Expensive legal battles often delay the opening of a group home for years.⁶⁰ The operation of some group homes has been obstructed by arson and vandalism. For example, six

They Are Placed: Declining Property Values, Crime, Deteriorating Quality of Life and Loss of Local Control (Oct. 1990). Since 1983, CRISP has reviewed and summarized major studies of the impact of group homes on neighborhoods. In 1990, 57 of the 58 studies CRISP reviewed found no concrete evidence to support negative attitudes. "The presence of group homes in all the areas studied has not lowered property values or increased turnover, not increased crime, not changed the character of the neighborhood. The homes have not deteriorated or become conspicuous institutional landmarks. Communities have come to accept them, and group home residents have benefited from access to community life." *Id.* at 92.

⁵⁷ Cindy Lee Soper, *The Fair Housing Act Amendments of 1988*, 37 St. Louis U. L.J. at 1041; Robert L. Schonfeld, "Five-Hundred-Year Flood Plains," 16 Fordham Urb. L.J. at 9-10.

⁵⁸ *Id.*

⁵⁹ As one City Council president stated, "I don't think anybody is against group homes But we would like to control them. . . . We want them in certain parts of the city where there is no direct contact with direct residential area." Jordana Hart, *Advocates for Disabled Persons Decry Medford Bar on Group Homes*, Boston Globe, Oct. 7, 1990, at 40; see also Mohamad Bazzi & Mae M. Cheng, *As the Debate About Facilities Intensifies, Activists and Advocates for the Disabled Face Off*, Newsday, Aug. 7, 1994, at 1 (statement of the president of the East Bayside Homeowners Association: "Personally, I'm opposed to all group homes in residential areas."); Mark Gillispie, *Convent in Maple Heights May Be Group Home*, Plain Dealer Rptr., June 18, 1994 (said one concerned neighbor about a group home for eight people with mental disabilities: "This house, from what I hear about it, is very dangerous because it's a bunch of lunatics. . . . I'll sign anything to get them out of there.").

⁶⁰ Michael Winerip, *Group Homes Are Invited Only to Leave*, N.Y. Times, Sept. 6, 1992, at 49 sec. 1 (describing a three year legal battle); Lynne Tuohy, *Battle for AIDS House Exacts Emotional Toll*, The Hartford Courant, June 13, 1992, at A1 (town lost nearly \$400,000 in legal fees; home closed for four years while legal battles were fought).

group homes for people with mental disabilities have been set afire on Long Island over the past fourteen years.⁶¹

C Restrictive Zoning Ordinances

Opponents of community integration have used local zoning and regulatory laws with considerable success. The modern remnants of the historical biases against persons with disabilities survive today in many such laws. Zoning laws like that at issue here are common, facially-neutral regulations that communities apply to exclude group homes from their neighborhoods. Most jurisdictions designate "'single family residential'" zones for families only.⁶² Most statutes permit unrelated persons to be a family, but only in small numbers (often five or fewer),⁶³ whereas related families can live together in unlimited numbers. Because group homes for people with disabilities sometimes comprise more than five unrelated people for programmatic and other reasons, they often do not meet the zoning definition of family.⁶⁴

⁶¹ See Michael Winerip, *Group Homes Are Invited Only to Leave*, N.Y. Times, Sept. 6, 1992, at 49 sec. 1. One of those fires delayed the opening of a proposed group home for ten people with mental illness for six months. Prior to the fire, the house was picketed by people carrying signs that said, "No More Mental Motels." Peter Marks, *Unwelcome Neighbors Long Island a Leader in Thwarting Group Homes for Mentally Ill*, Newsday, May 20, 1990, at 5.

⁶² Lester D. Steinman, *The Effect of Land-Use Restrictions on the Establishment of Community Residences for the Disabled*, 19 Urb. Law. at 2.

⁶³ Peter W. Salsich, Jr., *Group Homes, Shelters and Congregate Housing: Deinstitutionalization Policies and the NIMBY Syndrome*, 21 Real Prop. Prob. & Tr. J. 413 (Fall 1986).

⁶⁴ Many states have passed laws that preempt municipal zoning ordinances and provide that community residence for persons with disabilities can be placed in areas zoned for single family uses. Robert L. Schonfeld, "Five-Hundred-Year Flood Plains," 16 Fordham Urb. L.J. at 11-12 n.41. Because nearly all of these statutes also limit the number of people that may live in group homes permitted in a single family residential zone, they provide only limited relief from local restrictive definitions of family.

In addition, some municipalities require groups of unrelated people exceeding the specified number to obtain special-use permits or certificates of occupancy before locating in a single family residential zone, which related families are not required to do.⁶⁵ These procedures are burdensome, time consuming, expensive, and public; they delay and often prevent access to community housing. They provide communities a public forum to exploit the persistent stigma attached to many disabilities, such as mental illness or AIDS, and are thus particularly invasive and onerous for people with disabilities.

States and municipalities also have enacted zoning ordinances that explicitly impose requirements on housing for people with disabilities that are not placed on others.⁶⁶ Dispersion or "radius" requirements, for example, prohibit homes for people with disabilities from locating too close to one another. They usually specify the required distance -- ranging anywhere from 300 to 5000 feet -- between similar residences, and are enshrined in the laws of many states.⁶⁷ These kinds of limitations are said to prevent ghettoizing people with disabilities, supposedly working to distribute their housing throughout the community. More often than not, however, they simply foreclose affordable housing for people with disabilities.

⁶⁵ See, e.g., *Oxford House, Inc. v. City of Virginia Beach*, 825 F. Supp. 1251 (E.D. Va. 1993); *Oxford House, Inc. v. Township of Cherry Hill*, 799 F. Supp. 450 (D.N.J. 1992); *Stewart B. McKinney Found. v. Town Plan & Zoning Comm'n*, 790 F. Supp. 1197 (D. Conn. 1992).

⁶⁶ See, e.g., *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993) (neighbor notification requirement); *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43 (6th Cir. 1992) (extensive safety protections); *Horizon House Developmental Servs., Inc. v. Township of Upper Southampton*, 804 F. Supp. 683 (E.D. Pa. 1992) (1,000 feet spacing requirement), *aff'd mem.*, 995 F.2d 217 (3d Cir. 1993); *Familystyle of St. Paul, Inc. v. City of St. Paul*, 923 F.2d 91 (8th Cir. 1991) (limitation on placement); *Bangerter v. Orem City Corp.*, 797 F. Supp. 918 (D. Utah 1992) (two hour supervision); *Cason v. Rochester Hous. Auth.*, 748 F. Supp. 1002 (W.D.N.Y. 1990) (requirement of proof of ability to live independently).

⁶⁷ Robert L. Schonfeld, "Five-Hundred-Year Flood Plains," 16 *Fordham Urb. L.J.* at 12-13 n.45.

The harshness and unacceptability of these measures becomes apparent if one substitutes another group that has been subject to discrimination - blacks - for developmentally disabled persons in these anticoncentration provisions. What emerges is a zoning provision that, in order to prevent the deleterious effects of racial segregation, prohibits any black household from being sited within a specified distance from another black household. Although this measure might achieve racial integration, this is not a policy that comports with the individual liberties that are to be promoted by such regulations.⁶⁸

Some states and municipalities regulate group homes for people with disabilities by requiring home operators to obtain a license to operate the facility and/or by requiring such homes to satisfy more stringent safety requirements than homes for non-disabled people, such as additional fire safety equipment, including sprinkler systems, fire-retardant wall and floor coverings, lighted exit signs, push bars on all doors and an excessive number of fire extinguishers. Municipalities apply these requirements to all community housing for people with disabilities, without "individualizing [their] requirements to the needs or abilities of the people [they] purportedly sought to protect."⁶⁹

Therefore, zoning laws, such as that at issue here, are among the greatest barriers to community integration of people with disabilities. Congress intended to eliminate such practices unless they are justified by weighty health or safety concerns. Hence, the exemption at issue should be

⁶⁸ Martin Jaffe & Thomas P. Smith, *American Planning Ass'n, Siting Group Homes for Developmentally Disabled Persons* 12.

⁶⁹ Robert L. Schonfeld & Seth P. Stein, *Fighting Municipal "Tag-Team": The Federal Fair Housing Amendments Act and Its Use in Obtaining Access to Housing for Persons with Disabilities*, 21 *Fordham Urb. L.J.* 299, 326 (1994) (citing *Marbrunak, Inc. v. City of Stow*, 974 F.2d 43 (6th Cir. 1992) and *Potomac Group Home Corp. v. Montgomery County*, 823 F. Supp. 1285 (D. Md. 1993)).

limited to its terms and thereby accomodate the FHAA's purpose.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

LOIS G. WILLIAMS*
JERROLD J. GANZFRIED
GREGG A. HAND
ALICE M. CROOK
ELLEN S. WINTER
HOWREY & SIMON
1299 Pennsylvania Ave., N.W.
Washington, D.C. 20004
(202) 783-0800

Of Counsel:
LEONARD S. RUBENSTEIN
IRA A. BURNIM
BAZELON CENTER FOR
MENTAL HEALTH LAW
1101 15th Street, N.W.
Washington, D.C. 20005
(202) 467-5730

Counsel for *Amici Curiae*

*Counsel of Record

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APPENDICES

APPENDIX A

INTEREST OF *AMICI CURIAE*

Amici curiae are the principal national professional, advocacy and provider organizations dedicated to protecting the rights of and providing services to people with disabilities. *Amici* thus have substantial knowledge and experience regarding the history of discrimination against people with disabilities and the extent to which that discrimination continues to be present today. *Amici* are also knowledgeable and experienced in the need for and benefits of community integrated living arrangements for those with disabilities and the effect exclusionary zoning ordinances have on such a policy. These issues are relevant to the determination of whether local zoning ordinances are exempt from scrutiny under federal housing laws as they apply to people with disabilities.

Advocacy, Inc.

Advocacy, Inc. is the protection and advocacy agency designated by the Governor of the State of Texas to protect the rights of persons with mental and/or physical disabilities in areas such as employment, education, and housing. Advocacy, Inc. has represented thousands of Texans with disabilities, including residents of a group home for adults with mental retardation before the United States Supreme Court. See *City of Cleburne v. Cleburne Living Center*, 474 U.S. 432 (1985). Since 1981, Advocacy, Inc., in conjunction with persons with disabilities and family members of persons with disabilities, has identified and advocated the need for community integration in housing.

American Association on Mental Retardation

The American Association on Mental Retardation ("AAMR") is the nation's oldest and largest interdisciplinary organization of professionals who work exclusively in the

field of mental retardation. Today, AAMR has 9,500 members who work with people with mental retardation in both institutional and community settings. AAMR develops human resources and leadership, promotes high quality services and supports that enable full community inclusion and participation, encourages research and its dissemination and application, advocates for progressive public policies and influences public awareness and attitudes. The expressed mission of the AAMR is to enhance life opportunities and choices of people with mental retardation and their families, by exchanging information that advances the skills and knowledge of individuals in the field.

American Counseling Association

The American Counseling Association ("ACA") is an organization of counseling professionals who work in educational, health care, residential, private practice, community agency, government and business and industry settings. The mission of the ACA is to enhance human development throughout the life span and to promote the counseling profession. The case before the Court is of special interest to the over 13,000 members of ACA divisions of Mental Health Counselors and Rehabilitation Counselors, as well as the thousands of other ACA members who are engaged in the assisted living programs, education and training of mentally retarded persons.

American Network of Community Options and Resources

The American Network of Community Options and Resources ("ANCOR") (formerly the National Association of Private Residential Resources) is a nationwide association of over 550 private, non-profit, for-profit and family care agencies that together provide support and services to more than 50,000 people with disabilities. ANCOR has over twenty-five years of proven leadership representing private providers at the federal level. The membership serves persons of all ages, income levels, sexes and races in urban, rural and suburban areas -- supporting people wherever

they live and work. Most member agencies support group homes, apartments and other supported living arrangements. They prefer to establish homes in stable residential communities in order to best meet the needs of the people they support. The number of persons living in the homes varies depending upon their particular needs and preferences. Consequently, the case before the Court will have substantial impact on ANCOR's members.

The Arc

The Arc is the largest national voluntary organization in the United States devoted solely to the welfare of the more than seven million people with mental retardation. Together, more than 1,200 state and local chapters of The Arc work to ensure that people with mental retardation can realize the opportunity to live, learn, work and play in their communities. Since its inception, The Arc has vigorously challenged attitudes and public policy, based on false stereotypes, that have authorized or encouraged segregation of people with mental retardation in virtually all areas of life. It is the experience of The Arc that people with mental retardation have the capability to enjoy and contribute to the life of the community. For over a decade, a top priority of The Arc has been to make community-based supports, including an appropriate variety of housing options, available to people with mental retardation. The issue before this Court relates directly to the rights of persons with mental retardation seeking to live in community-based settings and is one of great interest to The Arc and its members.

Arc-Allegheny

Arc-Allegheny is a non-profit corporation that provides advocacy and other services to persons with mental retardation and their families and is the largest provider of such services in Allegheny County, Pennsylvania, which comprises the Pittsburgh metropolitan area. Members of Arc-Allegheny include individuals with mental retardation,

their parents and other family members, and individuals and professionals concerned about persons with mental retardation. For nearly forty years Arc-Allegheny has worked to secure and protect the legal rights of citizens with mental retardation.

The Arc of Pennsylvania

The Arc of Pennsylvania is a non-profit corporation created to advocate on behalf of persons with mental retardation in Pennsylvania. Members of The Arc include individuals with mental retardation, their parents and other family members, and individuals and professionals concerned about persons with mental retardation. The Arc long has acted on behalf of citizens with mental retardation and worked to ensure that the rights of such persons are protected. The issue before this Court relates directly to the rights of persons with mental retardation seeking to live in community-based settings and is one of great interest to The Arc and its members.

Autism National Committee, Inc.

The Autism National Committee, Inc. was founded in 1990 to advocate for the civil rights and human rights of all persons with autism, Pervasive Development Disorder and related disorders of communication and behavior. Through grassroots organizing, national level lobbying efforts, technical assistance in the development of organizations and services based on positive approaches, a national newsletter and an annual conference, the Committee assists people with autism, families, educators and other professionals toward their goal of full community inclusion.

Autism Society of America

The Autism Society of America ("ASA") was founded in 1965, and today is a leading national agency devoted to education, information and advocacy for the autism community. Operating through over 200 chapters

nationwide representing over 16,000 members, the ASA works on local, state and federal levels to increase public awareness of the disability and the unique needs of individuals with autism to the medical, education, research and service sectors. The mission of the ASA focuses on promoting lifelong access and opportunity for all individuals with autism to be fully participating, included members of their community. The case before the Court will directly impact the ASA's ability to carry out its mission.

California Alliance for the Mentally Ill

The California Alliance for the Mentally Ill ("CAMI") represents some 14,000 California residents who are parents, siblings, spouses and children of the severely mentally ill or are mentally ill themselves -- some of whom are dually diagnosed as neurobiologically disordered and recovering from substance abuse. The CAMI works on behalf of people with severe mental illness who are being successfully treated and who are a prime target of neighbors who fear the establishment of congregate housing for them.

Center for Public Representation

The Center for Public Representation is a public interest law firm with offices in Northampton and Newton, Massachusetts, which provides legal services to individuals with mental and physical disabilities. Among its other functions, the Center is the designated protection and advocacy program for individuals with mental illness in Massachusetts. Many of the Center's clients live in or seek to live in community based supported living situations. The Center has represented and currently represents individuals who have been denied the right to live in the communities of their choice because of zoning or other land-use regulations which limit their rights. The outcome of the case before the Court will have a substantial impact on the Center's clients.

Disability Rights Education and Defense Fund, Inc.

Disability Rights Education and Defense Fund, Inc. ("DREDF") is a national disability civil rights organization dedicated to securing equal citizenship for Americans with disabilities. Established in 1979, DREDF pursues its mission through education, advocacy and law reform efforts. In its efforts to promote the full integration of citizens with disabilities into the American mainstream, DREDF has represented and/or assisted hundreds of people with disabilities who have been denied their rights and excluded from opportunities, including access to appropriate and affordable housing because of false and demeaning stereotypes, and has fought to ensure that people with disabilities have the remedies necessary to vindicate their right to be free from discrimination.

Disability Rights in Voter Empowerment

Disability Rights in Voter Empowerment is a nonpartisan advocacy group focused on improving the quality of life for people with disabilities through the electoral process.

The Joseph P. Kennedy, Jr. Foundation

The Joseph P. Kennedy, Jr. Foundation, established in 1946 by Ambassador and Mrs. Joseph P. Kennedy, honors their oldest son who was killed in World War II. The Foundation has two major objectives: to improve the way society deals with its citizens who have mental retardation; and to help identify and disseminate ways to prevent the causes of mental retardation. The guiding strategy of the Foundation is to use its funds in areas where a "multiplier effect" can be achieved through development of innovative models for services and supports to persons with mental retardation and their families, or for highly selective demonstrations of the prevention of mental retardation. The Foundation operates by providing "seed" funding that encourages new methods of service and supports, and

through use of the Foundation's influence to promote public awareness of the needs of persons with mental retardation and their families.

Legal Action Center

The Legal Action Center is a non-profit policy and law organization that advocates on behalf of persons with past or current drug and alcohol problems and persons with HIV/AIDS. The Center provides direct legal assistance to individuals and families affected by addiction and HIV/AIDS, advises the treatment programs and community-based organizations that serve them, and advocates on their behalf with policymakers. Its aim is to fight discrimination that these individuals face in housing, employment and benefits and to dramatically expend prevention and treatment services. The outcome of the case before the Court will have a substantial impact on the Center's clients.

National Alliance for the Mentally Ill

The National Alliance for the Mentally Ill ("NAMI") is a national grassroots advocacy organization of families of persons with serious mental illness and persons with serious mental illness themselves. Composed of over 1,000 local affiliates and 140,000 members, NAMI's goals are to advance community-based treatment and services for persons with serious mental illness and provide public education about serious mental illnesses. This includes supportive housing which is a critical component in the continuum of community-based services required by persons with these disorders. The outcome of the case before the Court will have a substantial impact on members of the NAMI.

National Association of People with AIDS

The National Association of People with AIDS ("NAPWA") is dedicated to improving the lives of people with HIV/AIDS at home, in the community and in the

workplace. Founded in 1983 by a coalition of people with AIDS, NAPWA serves as a national information resource and "voice" for the needs and concerns of all Americans infected and affected by HIV. NAPWA is particularly committed to ensuring that people with HIV/AIDS understand their treatment options and have access to quality health care. The outcome of the case before the Court will have a substantial impact on NAPWA's members.

National Association of Protection & Advocacy Systems

The National Association of Protection and Advocacy Systems ("NAPAS"), founded in 1981, is a membership organization for the nationwide system of protection and advocacy agencies. Protection and advocacy systems are mandated under the Developmental Disabilities Assistance and Bill of Rights Act, 42 U.S.C. §§ 6000-6083 (1988 & Supp. V 1993) and related statutes, to provide legal representation and related advocacy services on behalf of all persons with disabilities. NAPAS provides protection and advocacy systems with training and technical assistance and represents their interests before the Executive and Legislative Branches of Government. NAPAS is deeply concerned that appropriate housing in the community be made available for persons with disabilities because its members have a statutory mandate to advocate for the full inclusion of persons with disabilities in all areas of life.

National Association of State Mental Health Program Directors

The National Association of State Mental Health Program Directors ("NASMHPD") is comprised of state and territorial agencies that administer public programs for the mentally disabled in the United States. Founded in 1959, the member agencies of NASMHPD operate the largest mental disability system in the world. The primary focus of the systems managed by the state mental health agencies is on services to people with serious mental disabilities, including assuring the availability of housing.

National Community Mental Healthcare Council

National Community Mental Healthcare Council ("NCMHC") represents community-based mental health agencies, state associations of such agencies and other affiliated provider groups. NCMHC is dedicated to the support and advancement of community-oriented mental health and mental health related services that promote the holistic enhancement of individual well being. Fundamental to its identity is the shared commitment to serve people who require direct or indirect public financial support for accessing services. The purposes of the NCMHC, as outlined by its bylaws, are to: promote a unified network of community mental health care providers, organizations and individuals on the national, state and local levels; provide national representation, leadership and direction for policy development and program implementation; promote the concept, financing and delivery of community-based mental health services; promote the delivery of quality care through education, information and training programs; provide national leadership by supporting research and design of models for both the promotion of mental health and the prevention of mental illness; promote increased public understanding of mental health; and promote increased public concern for mental illness.

National Mental Health Association

National Mental Health Association ("NMHA") is the national citizens voluntary advocacy organization working with and on behalf of people with mental illness. With 600 affiliates in forty-three states and the District of Columbia, NMHA has worked toward eliminating discrimination against people with mental illness since 1909. The alleviation of stigma and public misconceptions about mental illness and the people who have them is a continuing emphasis of NMHA and its affiliates. Part of NMHA's mission is to secure access to housing in communities for people with mental health treatment needs across the United States. The outcome of the case before the Court will have a

substantial impact on NMHA, its affiliates and the community members which they serve.

The National Organization for Rare Disorders

The National Organization for Rare Disorders ("NORD") is a federation of national voluntary health agencies and individuals dedicated to the identification, treatment and cure of rare "orphan diseases." NORD's membership is comprised of approximately 135 national support agencies devoted to specific rare disorders and more than 80,000 individuals. A rare disorder is defined under the Orphan Drug Act of 1983 as a disease or condition that effects fewer than 200,000 Americans. There are approximately 5,000 of these diseases cumulatively affecting an estimated twenty million Americans. Community-based residential living that promotes independence for severely disabled individuals with rare mental and physical disorders is of vital importance to many NORD members whose only alternative would be institutionalization in the absence of effective prevention, treatment or cure.

National Parent Network on Disabilities

The National Parent Network on Disabilities ("NPND") is a national organization comprised of 168 organizations that serves parents of children, youth and adults with any type of disability. NPND was established to provide a presence and national voice for parents of children, youths and adults with special needs. NPND shares information and resources in order to promote and support the power of parents to influence and affect policy issues concerning the needs of people with disabilities and their families. The NPND supports the rights of unrelated individuals with disabilities to live together in residential neighborhoods.

New York Lawyers for the Public Interest, Inc.

New York Lawyers for the Public Interest, Inc. ("NYLPI"), through its Disability Law Center and its *pro*

bono clearinghouse of sixty-eight private law firms and corporate law departments, advocates for the rights of persons with disabilities across New York State. NYLPI focuses on protecting the rights of persons with disabilities in housing, including advocating for integrated communities and against exclusionary zoning. NYLPI has appeared as *amicus curiae* and represented *amici curiae* before this Court in several cases involving the rights of persons with disabilities.

Phoenix House

Phoenix House is the largest private, non-profit drug abuse services agency in the country and provides treatment for approximately 1,800 adults and adolescents nationwide. A pioneer in the development of modern drug abuse treatment, Phoenix House was among the first to adopt self-help methods that make the individual the focus of the treatment and address the underlying causes of drug abuse.

Since its inception in 1967, Phoenix House has treated more than 60,000 people and has introduced model programs for drug prevention and intervention. Phoenix House has also conducted much of the research documenting the effectiveness of drug-free therapy and has trained clinicians responsible for drug treatment and intervention programs throughout the country. Today, Phoenix House operates fourteen long-term residential and outpatient facilities -- ten in the New York area and four in California.

Spina Bifida Association of America

The Spina Bifida Association of America ("SPAA") is a national organization representing the needs of individuals with spina bifida, their family members, healthcare providers, professionals and interested members of the general public. SBAA's purposes are: to provide information related to spina bifida in the areas of education, legislation, education, transportation and housing and to

help fund research into the causes, effects and treatment of spina bifida. This case is of special interest to the over 35,000 members of the SBAA, as well as parents, educators, therapists, doctors and other professionals who are engaged in promoting transition to independent living for individuals with disabilities because of discrimination against people with disabilities in regard to housing choices/options. SBAA believes that living in integrated, residential neighborhoods is a fundamental right for people with disabilities.

Sunrise Terrace, Inc.

Sunrise Terrace, Inc., doing business as Sunrise Retirement Homes and Communities ("Sunrise"), is the largest developer and operator of free-standing assisted living residences in the United States. Sunrise presently manages approximately forty assisted living communities for the elderly across the United States, serving over 2,000 residents. In addition, Sunrise provides development, management and consulting services to private and governmental elderly housing providers.

World Institute on Disability

The World Institute on Disability ("WID") was established twelve years ago to combat "handicappism." WID's goal is to use research, public education, training and model program development as a means to create a more accessible and supportive society for all people -- disabled and nondisabled alike. WID works internationally to support the integration of people with disabilities into the communities where they live. WID is a unique "think tank" on disability policy staffed by people with disabilities, including two federally funded research and training centers on public policy and independent living and on personal assistance services, an international division and divisions addressing policy on technology access and on AIDS. Integrated housing is a critical, fundamental issue for people with disabilities, just as it is for nondisabled people.

Appendix B State Statutes Adopting Policy of Community Residential Living

Cal. Welf. & Inst. Code § 5115 (West 1984) ("mentally . . . handicapped persons are entitled to live in normal residential surroundings . . .").

Colo. Rev. Stat. § 31-23-303(2)(a) (1990) ("establishment of state-licensed group homes for . . . developmentally disabled persons is a matter of statewide concern").

Fla. Stat. Ann. § 393.062 (1993) ("greatest priority shall be given to the development and implementation of community-based residential placements").

Haw. Rev. Stat. § 333E-1(7) (Michie 1991)
("[d]einstitutionalization of the developmentally disabled is a major goal of the [s]tate").

Idaho Code § 67-6530 (1989) ("mentally . . . handicapped . . . persons are entitled to live in normal residential surroundings . . .").

La. Rev. Stat. Ann. § 28:476 (West 1989) ("mentally . . . handicapped persons are entitled to live in the least restrictive environment in their own community and in normal residential surroundings").

Mont. Code Ann. § 53-20-101(1), (2) (1993) ("secure for each person who may be developmentally disabled such treatment and habitation . . . in a community-based setting").

N.C. Gen. Stat. § 168-20 (1987) ("policy of this [s]tate to provide handicapped persons with the opportunity to live in a normal residential environment").

Appendix C

Scientific Literature Demonstrating Benefits of Community Homes for People with Mental Retardation

James W. Conroy et al., 1990 *Results of the CARC v. Thorne Longitudinal Study* (Report No. 10), Connecticut Department of Mental Retardation 40-43, 55, 66 (Jan. 1991). Results of the Longitudinal movement from large congregate setting to small community setting showed increase in adaptive behavior, societal interaction, valued employment, quality of life, and family satisfaction).

James W. Conroy & Valerie J. Bradley, Temple University Developmental Disabilities Center, Philadelphia, Human Services Research Institute, Boston, *The Pennhurst Longitudinal Study: A Report of Five Years of Research and Analysis* (Mar. 1985) (A five year study of the impact of deinstitutionalization of people from Pennhurst Center (86% were labeled severely retarded) into small community living arrangements (ranging from one to eight with an average of three) showed significant increase in adaptive behavior -- nearly ten times greater than the growth displayed by matched people still at Pennhurst, a marked decrease in dependency, and a significant increase in happiness in most aspects of their lives).

John Lord & Alison Pedlar, *Life in the Community: Four Years After the Closure of an Institution*, 29 *Mental Retardation* 213, 219 (1991) (study of life experiences of eighteen people four years after deinstitutionalization where all but two moved to a group home found that virtually everyone had progressed in terms of skills development, and family members reported that their relative was generally happier and responding positively to the stimulation of community living).

Sherri Larson & Charlie Lakin, University of Minnesota Institute on Community Integration, *Deinstitutionalization of Persons with Mental Retardation: The Impact on Daily Living Skills* (Mar. 1989) (concluded based on eighteen studies that

people who move from state institutions to small community settings experience increases in adaptive behavior).

Sheryl A. Larson & K. Charlie Lakin, University of Minnesota Institute on Community Integration, *Parent Attitudes About Their Daughter's or Son's Residential Placement Before and After Deinstitutionalization* (Nov. 1989) (citing R.H. Horner et al., University of Oregon, Specialized Training Program of the Center on Human Development, *An Activity-Based Analysis of Deinstitutionalization: The Effects of Community Re-Entry on the Lives of Residents Leaving Oregon's Fairview Training Center* (1988)).

B.K. Hill & R.H. Bruininks, University of Minnesota, Center for Residential and Community Services, *Family Leisure and Social Activities of Mentally Retarded People in Residential Facilities* (1981) (referring to substantial evidence that for persons with all levels of mental retardation, moving to a community setting results in improved adaptive behavior and increased social participation).

Timothy M. Cook, *The Americans With Disabilities Act: The Move to Integration*, 64 *Temp. L. Rev.* 393, 455 (1991) (citing Gary B. Seltzer, *Community Residential Adjustment: The Relationship Among Environments, Performance and Satisfaction*, 85 *Am. J. Mental Deficiency* 624 (1981) (finding that community residences are more oriented toward individual autonomy and decisionmaking)).